SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 344

PUGET SOUND POWER & LIGHT COMPANY,
APPELLANT,

vs.

THE CITY OF SEATTLE

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

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IN SUPERIOR COURT OF KING COUNTY

No. 255,140

PUGET SOUND POWER & LIGHT COMPANY, a Corporation,
Plaintiff,

vs.

THE CITY OF SEATTLE, a Municipal Corporation, Defendant

AMENDED COMPLAINT—Filed Sept. 19, 1932

Comes now the plaintiff and with permission of the court files its amended complaint, and for its first cause of action against defendant alleges:

I

That at all times herein mentioned since 1912, plaintiff has been and now is a public utility corporation, duly organized and existing under and by virtue of the laws of the State of Massachusetts, and as such was and is duly authorized to engage in its business in the State of Washington; that plaintiff has had and has its main office and principal place of business in the City of Seattle, King County, Washington; that plaintiff as such corporation has been and is now engaged in the business of selling and furnishing electric light and power to the public for hire in the City of Seattle and State of Washington and by its corporate charter is empowered and authorized to engage in such business; that plaintiff has paid its last annual license fee and all other fees required to be paid by plaintiff under the laws of the State of Washington.

II

That defendant The City of Seattle is a municipal corporation, organized and existing as a city of the first class, [fol. 2] under and by virtue of the laws of the State of Washington, and a special charter which was adopted by defendant pursuant to such laws at the general election held March 3, 1896, and amended at general elections during succeeding years; that as such municipal corporation

at all times herein mentioned defendant, in a proprietary capacity, has been and now is engaged in the business of selling and furnishing electric light and power to the public for hire within the corporate limits of the City of Seattle, and has been and now is engaged in direct and active competition with plaintiff in such business.

III

That under the laws of the State of Washington defendant, The City of Seattle, has sole and exclusive power to fix and determine the rates at which it will sell electric light and power to its customers, and the rules, regulations and practices which it desires to follow in its said proprietary business of selling said electric light and power to the public; that with respect to its rates, rules, regulations and practices, defendant is not in any respect regulated by the State of Washington or its Department of Public Works; that under the laws of the State of Washington the property of defendant, used by it in its electric light and power utility business, is exempt from property taxes for city, county and state purposes; and that defendant is not required to pay and does not pay any such taxes.

IV

That plaintiff under the laws of the State of Washington Remington's Compiled Statutes, #10362, is subject to the exclusive jurisdiction and regulation of the Department of Public Works of the State of Washington as to the rates which plaintiff may charge its electric light and power customers and as to the rules, regulations and practices to be followed by it in the conduct of its said business; that with [fol. 3] respect to plaintiff's rates, rules, regulations and practices defendant has no lawful power of supervision, control or regulation; that under the laws of the State of Washington plaintiff is required to pay and does pay annual taxes for state, county and city purposes upon all of its property (including its franchise hereinafter described, granted by defendant) used in its said business in the amount of many thousands of dollars.

V

That the number of customers in the City of Seattle to whom electric light and power may be sold and the amount

thereof to be purchased is limited by the population of the City of Seattle and the needs of its inhabitants for electric light and power service, which customers may secure electric light and power only from plaintiff or defendant; that defendant at all times herein mentioned has been and is actively engaged in soliciting customers in the City of Seattle to whom it may sell electric light and power and is and has been actively soliciting customers of plaintiff to cease purchasing electric light and power from plaintiff and to make such purchases from defendant; that by reason thereof plaintiff, in order to retain its customers, is obliged to sell its electrical energy, light and power at a rate no higher than the rate fixed and determined by defendant as the rate to be charged defendant's customers.

VI

That defendant for hire in its proprietary capacity annually sells to defendant in its governmental capacity all of the electric light and power used by defendant for lighting its public streets and other municipal purposes; that the price paid by defendant to itself for such electrical energy is arbitrarily fixed and determined by defendant regardless of the market value of same and regardless of the price at which defendant could secure same in the open market; that to pay itself for such electrical energy money, in the amount thus determined by defendant as the price to [fol. 4] be paid for same, is transferred by defendant from its General Fund to its City Light Fund, which is the fund of defendant into which is paid all gross revenues received by defendant from its proprietary business of selling electric light and power to the public for hire; that the gross revenues of defendant's said proprietary business are annually increased in the amount of several hundred thousand dollars by such payments from defendant's General Fund, the amount of such increase for the year 1932 being in excess of the sum of $438,750.

VII

That plaintiff is the lawful owner and holder of a franchise known as the "Shuffleton Franchise", which was granted by defendant, The City of Seattle, by an ordinance known as Ordinance No. 7894 entitled:

"An Ordinance granting to S. L. Shuffleton, his successor and assigns, the right, privilege and franchise to construct, maintain and operate equipment and utilities for an Underground Electrical System, and to erect and maintain poles, wires and appurtenances for the distribution of electric light, heat and power in, over and under the streets, alleys and public places of the City of Seattle,"

passed by the City Council March 12, 1902, approved by the Mayor of said city on March 14, 1902, and accepted by the grantee March 27, 1902, Comptroller's File No. 245.

That said franchise inter alia grants to plaintiff for a period of fifty years, expiring March 14, 1952, "the right, authority and franchise on the conditions and for the considerations in this ordinance expressed, to construct, maintain and operate equipment and apparatus for an underground electric system, and to erect and maintain poles, wires and appurtenances for the distribution of electric light, heat and power in, over and under the streets, alleys and public places of the City of Seattle. This right, authority and franchise is intended to apply to all streets, [fol. 5] alleys and public places of said city, now or hereafter existing, subject to the terms and conditions hereinafter expressed; and said grantee, his successor and assigns, by accepting this ordinance, covenant that within three years from the approval of this ordinance he or they will have in operation a system extending to all streets and parts of streets now lighted by electricity;" that said grant is, by the terms of said franchise, subject to repeal or modification only "if the franchise granted hereby is not operated in accordance with the provisions of this ordinance, or at all."

That relying upon said franchise, plaintiff and/or its predecessor in interest, in the City of Seattle has constructed and acquired power plants and extensive distribution facilities for the purpose of selling and furnishing electric energy, light and power to the public, and continuously since the grant of said franchise by defendant has maintained and operated and is now maintaining and operating said plants and facilities and/or "said franchise" for such purpose, as required by said ordinance.

That by reason of the facts herein alleged defendant has granted plaintiff full authority and a license to engage in

its business of furnishing and selling electric light and power for hire within the corporate limits of the City of Seattle until March 14, 1952; that defendant may not now impair or burden such grant and/or such authority by requiring the plaintiff to secure from defendant the additional license to engage in such business, which defendant by its ordinance hereinafter set forth is asserting the right to require plaintiff t secure.

VIII

That defendant began its venture in the business of selling electric light and power to the public for hire on January 31, 1902, when its City Council passed an ordinance known as Ordinance No. 7708 entitled:

[fol. 6] "An Ordinance specifying and adopting the plan proposed by the City of Seattle for the acquiring for the city by purchase or construction, or both, a plant and system for furnishing light or power, or both, for corporate or individual uses, or both such uses, declaring the estimated cost thereof as near as may be, authorizing an indebtedness therefor, and submitting the same for ratification or rejection to the qualified voters of said city at the general election to be held on March 4, 1902,"

passed by the City Council on January 31, 1902, and approved by the Mayor on January 31, 1902; said ordinance was ratified at the general election held on March 4, 1902; that in said ordinance provision was made for an issue of general lien bonds in the amount of $590,000.00, the proceeds from the sale of which were to be used in the purchase or construction of a plant or system for furnishing light and power to the public for hire; that thereafter from time to time other general lien bonds for extensions to the electric lighting and power facilities of the defendant were authorized and issued; that of such general lien bonds there are now and on December 31, 1931, were outstanding bonds in the total principal amount of $1,447,000, approximately.

IX

That in addition to such general lien bonds defendant has financed the acquisition, construction and development of its electric lighting and power system by the issuance of

revenue bonds, the first of which were authorized and issued in the year 1917; that the total principal amount of such revenue bonds which are now and on December 31, 1931, were outstanding, is approximately $32,852,000; that such revenue bonds have all been authorized and issued by ordinances enacted pursuant to the authority vested in defendant to do so by an act of the Legislature of the State of Washington which is Section 9491 of Remington's Compiled Statutes; that such revenue bonds are obligations against only the gross revenues received by the defendant from the sale of electric light and power to the public, [fol. 7] which gross revenues are by law and the provisions of each of said ordinances and by the terms and conditions of each of said bonds pledged to the payment of the principal of said bonds and any interest due thereon; that such pledge constitutes a charge upon such gross revenues "prior and superior to all other charges whatsoever, including charges for maintenance and operation."

X

That under Article VIII, Section 9, of the Charter of the City of Seattle, as amended March 4, 1913, all revenues due to the City of Seattle for electric light and power sold by it must be collected by the City Treasurer, who is required to keep said revenues in a separate fund, designated City Light Fund; that by virtue of Article IX, Section 17, of said Charter "no transfer shall be made from one fund to another except as otherwise provided in this charter, unless by an affirmative vote of a majority of the members elected of the City Council by ayes and noes recorded in the journal of proceedings;" that there is no other provision in said charter providing for the transfer of money from the Department of Lighting fund to the General Fund of the City of Seattle; that under Article IX section 6, of the Charter of the City of Seattle, it is required of the City Treasurer that "he shall not pay out any moneys belonging to the city except upon legal demands allowed and audited in the manner prescribed by this charter or by law"; that under Article IX, Section 7, of said Charter, the duties of the City Treasurer are specified as follows:

"It shall be the duty of the City Treasurer to receipt for the moneys of the city and to pay out the same only on warrants drawn in pursuance of the order of the City

Council and signed and registered by the City Comptroller."

XI

That pursuant to the law of the State of Washington, [fol. 8] Remington's Compiled Statutes, #9000, defendant, on October 5, 1931 adopted its budget of expenses and revenues for the year 1932; that under said law "each and every city official and employe" in making expenditures and in the incurring of liabilities, is limited "to the amounts of such detailed budget"; that in said budget no provision is made for payment of any license fee or tax by defendant out of the revenues of its Department of Lighting or other revenues; that under said law of the State of Washington and said budget no such payment may lawfully be made by defendant for or during the year 1932; that a copy of said budget is attached hereto, and by this reference made a part hereof.

XII

That on the 23rd day of May, 1932, the City Council of defendant the City of Seattle, in the exercise of a claimed governmental power and authority to do so, passed an ordinance known as Ordinance No. 62662 and/or No. 62662 as amended, which was approved by the acting mayor of said city on May 25, 1932, was on said date filed by the City Comptroller and ex-officio City Clerk, and on May 31, 1932, was duly published, which ordinance is entitled:

"An Ordinance relating to and providing for a license or occupation tax upon certain businesses, occupations, pursuits, and privileges; defining offenses and providing penalties."

That the terms and provisions of said ordinance, so far as same are pertinent to plaintiff's cause of action, are attached hereto, marked Exhibit "A" and by this reference made a part hereof; that defendant claims and asserts that said ordinance is in all respects a valid law and ordinance of the City of Seattle and that plaintiff is legally and validly thereby required to apply for the license, to file the return of its "gross income", and to pay the license fee or tax as provided in said ordinance, and that in default thereof plaintiff will be subject to the penalties therein specified.

[fol. 9] XIII

That to avoid the risk of the penalties provided in said ordinance No. 62662 and/or 62662 as amended, and to enable plaintiff in an orderly manner to lawfully contest the validity of said ordinance and the right of defendant by said ordinance to extract from plaintiff the license fee or tax therein provided, plaintiff, on July 1, 1932, all under written protest, a copy of which is attached and marked Exhibit "B", applied for the license, and although uncertain as to the meaning of "gross income", as same is defined in Section 2 of said ordinance and unable to determine the manner by which such gross income as defined could be ascertained, nevertheless made a return showing its "gross income" as required by said ordinance, and paid to defendant in cash the sum of $9,697.75, in payment of the first monthly installment of the license fee or tax that would be due to defendant if said ordinance were valid and enforceable as to plaintiff with respect to its electric light and power business; that plaintiff contending that said ordinance is invalid and unenforceable as to plaintiff, brings this action for the purpose of recovering from defendant the said money paid to defendant, under protest, as herein alleged.

XIV

That by said ordinance No. 62662 and/or No. 62662 as amended, defendant is not required to pay the license fee or tax therein specified out of revenues received by defendant from the sale of electrical energy which in its proprietary capacity in competition with plaintiff defendant furnishes and sells to the public for hire; nor is defendant by said ordinance required to pay such license fee or tax at all; and that said ordinance is in no respect enforceable against defendant and in no respect imposes said license fee or tax upon defendant.

[fol. 10] XV

That in truth and in fact defendant has not paid the license fee or tax specified in said ordinance or any part thereof; and upon information and belief, based upon the form in which said ordinance was enacted as hereinbefore alleged and the failure of defendant to pay said license fee

or tax, plaintiff alleges that defendant does not intend to pay and will not pay said license fee or tax or any part thereof.

XVI

That regardless of the good or bad faith of defendant in the enactment of said ordinance, regardless of defendant's assertion of a willingness to cause money received by it from the sale of electrical energy for hire to be transferred to its General Fund and regardless of any assertion by defendant of its intention to make such a transfer, even though the said ordinance does not require defendant so to do, plaintiff asserts that under the facts as herein alleged defendant by the enactment of said ordinance is in truth and in fact unlawfully exercising its governmental power of taxation in aid of its proprietary business of selling and furnishing electrical energy to the public for hire; that under the facts herein alleged the exercise of such governmental power of taxation by defendant against plaintiff, its competitor, as defendant by said ordinance is asserting the right to exercise same, will enable defendant as prosecutor, jury, judge and executioner to annihilate plaintiff's business to the benefit of defendant's proprietary competing business; that to permit defendant by the exercise of such governmental power of taxation to extract such a portion of plaintiff's gross income as defendant, may designate, and/or as defendant in said ordinance has designated, which gross income is definitely limited by defendant's competition with plaintiff, as herein alleged, will deprive plaintiff of its property without due process of law, and will deny plaintiff equal protection of the law, in contravention of the Fourteenth Amendment to the Constitution of the United States and Article I, Sec- [fol. 11] tion 16, of the Constitution of the State of Washington, and will constitute a taking of plaintiff's property for a public purpose without just compensation, in contravention of the Fifth Amendment to the Constitution of the United States; that as to plaintiff any exercise of such power by defendant is and can only be unjust, unfair, unreasonable, inequitable and discriminatory; that defendant by reason of its competition with plaintiff and the facts herein alleged, is as to plaintiff estopped from any such exercise of such governmental power of taxation.

XVII

That the State of Washington by virtue of Chapter 227 of its Laws of 1929 has required plaintiff to secure and that plaintiff has secured and now has, and since July 1, 1932, has had from the State of Washington, a license by which plaintiff is authorized to engage in its business of selling and furnishing electric light and power for hire in the State of Washington, which license by its terms and the terms of said statute is paid for by defendant and is issued by the State of Washington "for the privilege of doing" its intrastate business in the entire State of Washington, including the City of Seattle.

XVIII

That the State of Washington by virtue of Chapter 107 and Chapter 227 of its Laws of 1929 annually collects from plaintiff, and plaintiff since the enactment thereof has annually paid to the State of Washington one-tenth of one per cent of the gross operating revenue received by plaintiff from its business of selling and furnishing electric light and power in the State of Washington, including the City of Seattle; that the total amount of such tax and annual license fee paid to the State of Washington by plaintiff for the current calendar year was $12,871.40.

[fol. 12]

XIX

That by the enactment and enforcement of Chapters 107 and 227 of its Laws of 1929, as alleged in paragraphs XVII and XVIII hereof, the State of Washington has occupied the field of levying an excise tax upon the business of plaintiff and or of levying a license tax upon plaintiff for revenue purposes, and has thereby excluded defendant from said field of excise taxation, and has thereby taken from defendant all power and authority, if any it had prior thereto, to exact of plaintiff a license fee for revenue purposes and or an occupation tax.

XX

That continuously since July 1, 1932, the rates charged by defendant and the rates now charged by it for the electric light and power which it sells to the public for hire are in no respect greater than were the rates charged

by defendant for same prior to July 1, 1932, and prior to the enactment of said ordinance No. 62662 and/or No. 62662 as amended.

XXI

That as to plaintiff said ordinance No. 62662 and/or No. 62662 as amended is invalid, unlawful and unenforceable for the following reasons:

(1) Under the laws of the State of Washington defendant has no power or authority to enact and/or to enforce said ordinance and/or to impose upon plaintiff the license fee or tax provided therein.

(2) Under the laws of the State of Washington defendant has no power or authority to impose an occupation tax upon plaintiff.

(3) By reason of the direct and active competition existing between plaintiff and defendant as herein alleged, defendant may not lawfully extract from plaintiff the amount of the license fee and/or tax provided in the ordinance.

(4) The ordinance and the enforcement thereof as to plaintiff would deprive plaintiff of its property and prop- [fol. 13] erty rights without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 3, of the Constitution of the State of Washington.

(5) The ordinance and the enforcement thereof as to plaintiff would take plaintiff's private property for a public use without just compensation, in contravention of the Fifth Amendment to the Constitution of the United States and Article I, Section 16, of the Constitution of the State of Washington.

(6) The ordinance and the enforcement thereof as to plaintiff would deny plaintiff equal protection of the law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

(7) The ordinance and the enforcement thereof as to plaintiff would impair the obligation of the franchise granted to plaintiff by defendant and would impose upon plaintiff additional and unjust obligations which violate the

terms of its franchise, in contravention of Article I, Section 10 of the Constitution of the United States.

(8) The ordinance and the enforcement of its terms as to plaintiff would take from plaintiff property rights and privileges lawfully vested in plaintiff under the franchise granted by defendant, without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 3, of the Constitution of the State of Washington.

(9) The State of Washington by the enactment of Chapter 227 of its Laws of 1929, requiring a foreign corporation to pay an annual license fee "for the privilege of doing business" in the State of Washington (which fee plaintiff has paid and is now paying) and by the enactment of Chapter 107 of its Laws of 1929 and Chapter 107 of its Laws of 1923 requiring each public utility corporation engaged in business in the State of Washington to pay a fee of one-tenth of one per cent of its gross operating revenue from [fol. 14] intrastate transactions into the public service revolving fund of the State of Washington (which fee plaintiff has paid and is now paying), has entered upon the field of levying an excise tax upon the "carrying on" of the business of plaintiff; that by reason thereof defendant is precluded from extracting the license fee or tax provided in said ordinance from plaintiff.

(10) The ordinance violates Chapter 227 of the Laws of 1929 of the State of Washington, pursuant to which plaintiff is licensed to engage in the business of selling and furnishing electric light and power in and throughout the State of Washington, including the City of Seattle.

(11) The ordinance conflicts with and contravenes Chapter 107 of the Laws of 1929 of the State of Washington, pursuant to which plaintiff has paid and pays a fee of one-tenth of one per cent of its gross operating revenue into the public service revolving fund of the State of Washington.

(12) The ordinance unlawfully discriminates against plaintiff and in favor of defendant in that: (a) it does not require payment of said license fee or tax by the defendant out of revenues received by it from the sale of electric light and power; (b) it provides no valid or other method whereby the fee or tax ostensibly imposed upon defendant

by said ordinance can be enforced, paid or collected, and to that extent is ineffective and wholly null and void; (c) the prior pledge of the gross revenues received by defendant from the sale of electric light and power to the payment of the revenue bonds of the city deprives defendant of any lawful right to divert from such gross revenues the amount of money necessary to enable defendant to pay the fee or tax which the ordinance ostensibly requires it to pay; (d) under the Seattle budget for 1932 any attempt by any officer or employe of defendant to pay said tax for the year 1932 out of the revenue of its lighting department would be in violation of the law of the State of Washington; and (e) while the ordinance and the enforcement thereof as to plain-[fol. 15] tiff would require actual payment by plaintiff of the fee or tax provided therein, defendant, as to its similar competing utility business, owned and operated in its proprietary capacity, is in fact and in law and by the terms of said ordinance exempt from payment of said fee or tax; that by reason thereof said ordinance and such classification is discriminatory, arbitrary, unreasonable, unreal, unfair and unlawful, and in contravention of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 3, of the Constitution of the State of Washington.

(13) The enactment of said ordinance constitutes an illegal attempt by defendant to regulate rates, charges, business and operations of plaintiff, in violation of the laws of the State of Washington delegating such authority solely and exclusively to the Department of Public Works of the State of Washington, and is an illegal attempt by the City of Seattle to usurp the functions and powers of said State Department.

(14) That in its operation and effect said ordinance if enforced as to plaintiff, will enable defendant to annihilate plaintiff's business and will deprive plaintiff of its property without due process of law, and will constitute unlawful, unfair, unjust, unreasonable and confiscatory competition, in contravention of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 3 of the Constitution of the State of Washington, and will constitute an unlawful taking of plaintiff's property by the exercise of a governmental power without just compensa-

tion, in contravention of the Fifth Amendment to the Constitution of the United States and Article I, Section 16, of the Constitution of the State of Washington.

(15) Defendant has no power to compel plaintiff under penalty of fine and/or imprisonment, or both, as provided in said ordinance to make a return of its gross income [fol. 16] and/or to pay said license fee or tax and/or to apply for and obtain a new and additional license to carry on its business as a condition precedent (a) to the exercise of the precise rights and privileges granted plaintiff in its franchise from defendant and/or (b) as a condition precedent to plaintiff's lawfully rendering the service which as a public utility company it is legally licensed to render by the State of Washington and is legally required to render to the public whether the license specified in said ordinance is granted or withheld by defendant.

(16) The penalties provided in said ordinance are excessive, oppressive, unusual and confiscatory and as such are in contravention of the Eighth Amendment to the Constitution of the United States and Article I, Section 14, of the Constitution of the State of Washington, and in excess of any penalty which the City of Seattle has power to impose.

(17) The ordinance, if enforced as to plaintiff would operate to require plaintiff to secure the license and to extract from plaintiff the fee or tax provided therein, not only under the penalty provided in the ordinance but also, as provided in the prior franchise granted to plaintiff by defendant, under the further penalty of having said franchise become subject to repeal by defendant if plaintiff fails to operate its electric light and power system in the City of Seattle and/or fails to operate said franchise, and would unlawfully add an additional burden to said franchise, and would thereby impair the obligation of said franchise, in contravention of Article I, Section 10, of the Constitution of the United States, and would deprive plaintiff of its property without due process of law, in violation of the due process clauses of the Constitutions of the United States and the State of Washington.

(18) The license fee or tax provided by said ordinance is not levied in pursuance of law as required by Article VII, Section 5, of the Constitution of the State of Washington.

[fol. 17] (19) The license fee or tax provided by said ordinance is not uniform in respect to persons and property within the jurisdiction of the City of Seattle as required by Article VII, Section 9, of the Constitution of the State of Washington.

(20) The method of appeal and review provided in said ordinance is indefinite, inadequate, unfair and unlawful in that in denies to plaintiff the right to a fair and impartial review of the determination of the City Council of the City of Seattle as to the amount of the fee or tax plaintiff may be required to pay, in contravention of the due process clause of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 3 of the Constitution of the State of Washington.

(21) The ordinance, and particularly Section 2 thereof in which the term "gross income" is defined, is vague, indefinite and uncertain with respect to the amount of the tax to be paid and the manner by which the amount may be ascertained, to an extent that the taxpayer may not without litigation determine the amoun of the tax he would owe, and is therefore invalid and unenforceable, even though the ordinance were not otherwise invalid.

XXII

That by reason of the above and foregoing allegations said ordinance as to plaintiff is invalid, void and unenforceable; that defendant is not lawfully entitled to retain the money paid under protest by plaintiff to defendant as alleged in paragraph XIII hereof, and that plaintiff is lawfully entitled to recover said money in the amount of $9,697.75 from defendant, together with interest thereon from the first day of July, 1932, until paid.

Wherefore, under its first cause of action plaintiff prays judgment against the defendant in the sum of $9,697.75, together with interest thereon at the rate of six per cent per annum from July 1, 1932, until paid, and for its costs and disbursements herein to be taxed.

For its second cause of action against defendant, plaintiff alleges:

[fol. 18] I

Plaintiff incorporates in this its second cause of action against defendant each and every allegation contained in

paragraphs I to XXII (both inclusive) of its first cause of action (supra), the same in all respects as though each of said allegations contained in each of said paragraphs numbered I to XXII, respectively, were specifically set forth herein.

II

That defendant unlawfully claims and asserts that under said ordinance plaintiff is required to pay to defendant, on or before the 10th day of August, 1932, an additional amount of $9,697.75, as the second monthly installment of the license fee or tax that would be due from plaintiff if said ordinance were valid and enforceable as to plaintiff, and that plaintiff is required to pay a like amount on or before the 10th day of each succeeding month during the balance of the license tax year specified in said ordinance; and that upon failure to make such payments plaintiff will be subject to the penalties specified in the ordinance which defendant threatens it will endeavor to enforce against plaintiff.

III

That the general fund of defendant is now heavily overdrawn in the amount of approximately $2,000,000, and that the banks in the City of Seattle have since May, 1932, refused to cash or accept any and all warrants on said fund; that warrants drawn on said fund cannot be cashed; that if plaintiff continues to pay said monthly installments of said license fee or tax, and the said ordinance is declared to be void, invalid and unconstitutional as contended by plaintiff, the time of repayment thereof to plaintiff by defendant is wholly conjectural and uncertain.

IV

That should plaintiff pay such illegal fees or taxes pursuant to the terms of said ordinance, and be compelled to [fol. 19] resort to suit to recover same from defendant, plaintiff's remedy would be neither timely, adequate nor complete; that plaintiff would be thereby caused to suffer an irreparable injury, and be thereby compelled to resort to a multiplicity of suits and prolonged litigation in order to obtain any relief from such unlawful taxation.

V

That should plaintiff refuse to make payment of said monthly installments of such license fee or tax, plaintiff will be subject (1) to heavy, unlawful, oppressive and confiscatory penalties in addition to such license fee or tax, which penalties are in themselves violative of the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution of the United States, penalties which are of such a nature that the threat of same entitles plaintiff to injunctive relief; (2) to being deprived of the right to exercise the corporate powers granted plaintiff by the State of Massachusetts and the license granted plaintiff by the State of Washington, and the franchises granted plaintiff by defendant; (3) to being unlawfully deprived of its lawful right to continue in business as a public utility company in the City of Seattle; and (4) to being denied the opportunity to perform its lawful duty as a public utility company, which is required by the laws of the State of Washington and by the common law to continuously serve the public.

VI

That plaintiff is ready, able and willing to pay such license fee or tax, if any, as may be lawfully due or owing by plaintiff to defendant.

VII

That by reason of said facts as herein alleged plaintiff has no adequate remedy except in a court of equity, and unless equitable relief by injunction, temporary and permanent, is granted by this court, plaintiff will be deprived of its lawful rights as herein alleged.

[fol. 20] Wherefore, under its second cause of action plaintiff prays a judgment and decree of this court as follows:

(1) That defendant, its officers, agents and employes be forever enjoined and restrained from enforcing as against plaintiff the said ordinance No. 62662 and/or No. 62662 as amended, or any portion thereof.

(2) That pending the determination of this suit defendant, its officers, agents and employes be temporarily enjoined and restrained from enforcing as against this plaintiff the said ordinance No. 62662 and/or No. 62662 as amended, or any portion thereof, and that defendant be required to show cause on a day certain to be fixed by this Court why such temporary injunction should not be granted as herein prayed.

(3) That plaintiff do have and recover its costs and disbursements herein.

(4) That plaintiff have such other and further relief as to the court may seem just and proper.

Todd, Holman and Sprague and Clarence Innis,
Attorneys for Plaintiff.

[fol. 21] EXHIBIT "A" TO AMENDED COMPLAINT

Ordinance No. 62662

An ordinance relating to, and providing for, a license or occupation tax upon certain businesses, occupations, pursuits and privileges; defining offenses and providing penalties

Be it ordained by the City of Seattle as follows:

Section 1. Exercise of Revenue License Power: The provisions of this ordinance shall be deemed an exercise of the power of the City of Seattle to license for revenue.

Section 2. Definitions: In construing the provisions of this ordinance, save when otherwise plainly declared or clearly apparent from the context, the following definitions shall be applied;

Gross Income: The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not), by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes,

bonds, mortgages, or other evidences of indebtedness or stocks and the life) and without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses.

Person or Persons: Persons of either sex, firms, copartnerships, corporations and other associations of natural persons, whether acting by themselves or by servants, agents or employes.

Taxpayer: Any person liable to the license fee or tax imposed by this ordinance.

[fol. 22] Tax Year or Taxable Year: The year commencing March 1st and ending on the last day of February of the following year, or, in lieu thereof the taxpayer's fiscal year when permission is obtained from the City Comptroller to use the same as the tax period.

Section 3. "Occupation License" Required: After the 1st day of July, 1932, no person shall engage in or carry on any business, occupation, pursuit or privilege for which a license fee or tax is imposed by this ordinance without having first obtained, and being the holder of, a valid and subsisting license so to do, to be known as an "Occupation License."

Any person engaging in, or carrying on, more than one such business, occupation, pursuit or privilege shall pay the license tax so imposed upon each of the same.

Any taxpayer who engages in, or carries on, any business subject to tax hereunder without having his "Occupation License" so to do, shall be guilty of a violation of this ordinance for each day during which the business is so engaged in or carried on, and any taxpayer who fails or refuses to pay the license fee or tax or any part thereof on or before the due date shall be deemed to be operating without having his license so to do.

Section 4. License Tax Year: All "Occupation Licenses" shall be for the tax year for which issued and shall expire at the end of such tax year.

Such "Occupation License" and the fee or tax therefor hereby imposed shall be for the year commencing March 1st and ending on the last day of February of the following year; Provided, however, that if the taxpayer in transacting his business keeps the books reflecting the same for a

fiscal year not based on the calendar year, he may, with the assent of the City Comptroller, obtain his license for the period of his current fiscal year which shall be deemed his tax year, and pay the fee or tax computed upon his [fol. 23] gross income made during his fiscal year (next preceding his tax year) covering his accounting period as shown by the method of keeping the books of the business.

Section 5. Occupations Subject to Tax—Amount: There are hereby levied and shall be collected annual license fees or occupation taxes against the persons on account of the business activities, and in the amounts to be determined by the application of the rate against gross income, as follows:

(a) * * *

(b) Upon every person engaged in or carrying on the business of selling or furnishing gas and/or water for hire, a fee or tax equal to three per cent (3%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided however, that the minimum fee or tax shall not be less than One Thousand ($1,000.00) Dollars per tax year.

(c) Upon every person engaged in or carrying on the business of selling or furnishing electric light and power a fee or tax equal to three per cent (3%) of the total gross income from such business in the City during his fiscal year next preceding the tax for which the license is required; provided, however, that the minimum fee or tax shall not be less than Two Hundred Fifty ($250.00) Dollars per tax year.

(d) Upon every person conducting or engaged in the business of supplying steam heat or power to the public for hire a fee or tax equal to four per cent (4%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than Fifty ($50.00) Dollars per tax year.

(e) * * *

Section 6. City of Seattle, Subject to Tax: Subdivisions (b) and (c) of Section 5 shall, so far as permitted by law, be

applicable to the City of Seattle, except that said City shall [fol. 24] not as a taxpayer, be required to conform to the other provisions of this ordinance.

Section 7. * * *

Section 8. Tax Apportioned for Year 1932: For the remainder of the tax year 1932, ending on the last day of February, 1933, the fees or taxes herein imposed shall be apportioned in the ratio of said remainder to a full tax year.

Section 9. Exceptions and Deductions: There shall be excepted and deducted from the total gross income upon which the license fee or tax is computed so much thereof as is derived from transactions in interstate or foreign commerce, or from business done for the government of the United States, its officers or agents, and any amount paid by the taxpayer to the United States, the State of Washington, or the City of Seattle, as excise taxes levied or imposed upon the sale or distribution of property or services.

Nothing in this ordinance shall be construed as requiring a license or the payment of a license fee or tax, or the doing of any act, which would constitute an unlawful burden or interference in violation of the Constitution or laws of the United States, or which would not be consistent with the Constitution or laws of the State of Washington.

Any person subject to the payment of a license fee or tax under the provisions of any ordinance of the City, other than this, on account of engaging in any activity for which he is liable to tax hereunder, may deduct the amount of such fee or tax from the amount of fee or tax imposed by this ordinance on account of such activity, but such person shall nevertheless in the manner herein provided for, apply for and procure an "Occupation License."

Section 10. Application or Return for License: On or before the 1st day of July, 1932, and thereafter on or before the first day of each tax year, every taxpayer shall apply to the City Comptroller for an "Occupation License" upon [fol. 25] blanks or forms of return to be prepared and provided by him requesting such information as may be necessary to enable him to arrive at the lawful amount of the fee or tax. The taxpayer shall, in a legible manner write in such blank or form of return the information required and

shall sign the same and by affidavit at the foot thereof shall swear or affirm that the information therein given is full and true and that he knows the same to be so.

Every such application or return shall be accompanied by a remittance by bank draft, certified check, cashier's check or money order, payable to the City Treasurer, or in cash, in the amount of the tax or fee or installment thereof required by the provisions hereof.

If the applicant be a partnership, the application or return must be made by one of the partners; if a corporation, by one of the officers thereof; if a foreign corporation, co-partnership or non-resident individual by the resident agent or local manager of said corporation, co-partnership or individual.

Section 11. Monthly and Quarterly Payment of Tax: Where the amount of the license fee or tax is based upon gross income the taxpayer may pay his fee or tax in equal monthly installments during the life of his license, each such installment to be paid on or before the 10th day of the month. In all other cases the taxpayer may pay his fee or tax in equal installments during the life of his license, each such installment to be paid on or before the 1st day of March, the 1st day of June, the 1st day of September and the 1st day of December respectively.

Section 12. When Tax Based on Current Year—Commencement of Business During Tax Year: Where a business, occupation or pursuit subject to tax upon gross income has not been carried on for the full calendar or fiscal year next preceding the tax year for which license is required, the license fee or tax shall be paid monthly in installments during the life of the license on or before the 10th day of the month, and shall be based upon the gross [fol. 26] income for the month next preceding that in which payment is due. In such cases the taxpayer shall make monthly returns similar to the annual returns provided for herein on or before the 10th day of the month under oath or affirmation covering the business of the previous month.

In all other cases where a person commences during any tax year to engage in any business, occupation, pursuit or privilege he shall be entitled to a license for the remainder of such tax year for the required fee apportioned in the ratio of said remainder to a full tax year.

Section 13. Monthly Payments—License Prerequisite: In any case where the taxpayer pays his license fee or tax monthly he shall nevertheless first procure his "Occupation License" in the manner herein required before commencing or continuing in business, and shall pay the minimum fee or tax therefore, which shall be credited against future installments.

Section 14. Sale or transfer of Business: Upon the sale or transfer during any tax year of a business on account of which a fee or tax is hereby required, the purchaser or transferee shall, if the fee or tax has not been paid in full for said year, be responsible for its payment for that portion of said year during which he carries on such business.

Section 15. Taxpayer to Keep Books and Records—Returns Confidential: It shall be the duty of each taxpayer taxed upon his gross income to keep and enter in a proper book or set of books or records an account which shall accurately reflect the amount of his gross income, which account shall always be open to the inspection of the City Comptroller, or his duly authorized agent, and from which said officer or his agent may verify the return made by the taxpayer.

The applications, statements or returns made to the City Comptroller pursuant to this ordinance, shall not be made public nor shall they be subject to the inspection of any [fol. 27] person except the Mayor, the Corporation Counsel, the City Comptroller or his authorized agent, and members of the City Council.

Section 16. Comptroller to Investigate Returns: If any taxpayer fails to apply for license or make his return, or if the City Comptroller is dissatisfied as to the correctness of the statements made in the application or return of any taxpayer, said officer, or his authorized agent, may enter the premises of such taxpayer at any reasonable time for the purpose of inspecting his books or records of account to ascertain the amount of the fee or tax or to determine the correctness of such statements as the case may be, and may examine any person under oath administered by said officer, or his agent, touching the matters inquired into, or said officer, or his authorized agent, may fix a time and place for an investigation of the correctness of the return and may issue a subpœna to the taxpayer, or any other

person, to attend upon such investigation and there testify, under oath administered by said officer, or his agent, in regard to the matters inquired into and may, by subpœna, require him, or any person, to being with him such books, records, and papers as may be necessary.

Section 17. Over or Underpayment of Tax: If the City Comptroller upon investigation or upon checking returns finds that the fee or tax paid or any of them is more than the amount required of the taxpayer, he shall refund the amount overpaid by a warrant upon the General Fund. If the City Comptroller finds that the fee or tax paid is less than required, he shall send a statement to the taxpayer showing the balance due, who shall within three (3) days pay the amount shown thereon.

Section 18. Remedy for Non-payment of Tax: If any taxpayer fails to apply for license or make his return, or to pay the fee or tax therefor or any part thereof, within three (3) days after the same shall have become due, the City Comptroller shall ascertain the amount of the fee or tax or installment thereof due and shall notify such tax-[fol. 28] payer thereof, who shall be liable therefor in any suit or action by the City for the collection thereof. The City Comptroller shall also notify the Corporation Counsel in writing of the name of such delinquent taxpayer and the amount due from him and said officer shall, with the assistance of the City Comptroller, collect the same by any appropriate means or by suit or action in the name of the City.

Section 19. Appeals to City Council: Any taxpayer aggrieved by the amount of the fee or tax found by the City Comptroller to be required under the provisions of this ordinance, may appeal to the City Council from such finding by filing a written notice of appeal with the City Clerk within five (5) days from the time such taxpayer was given notice of such amount. The Clerk shall, as soon as practicable, fix a time and place for the hearing of such appeal, which time shall be not more than ten (10) days after the filing of the notice of appeal, and he shall cause a notice of the time and place thereof to be delivered or mailed to the appellant. At such hearing, the taxpayer shall be entitled to be heard and to introduce evidence in his own behalf. The City Council shall thereupon ascertain the correct amount of the fee or tax by resolution and the City

Clerk shall immediately notify the appellant thereof, which amount, together with costs of the appeal, if appellant is unsuccessful therein, must be paid within three (3) days after such notice is given.

The President of the City Council, or the Chairman of any committee thereof before which the appeal is to be heard, may, by subpœna, require the attendance thereat of any person, and may also require him to produce any pertinent books and records. Any person served with such subpœna shall appear at the time and place therein stated and produce the books and records required, if any, and shall testify truthfully under oath administered by the Chair-[fol. 29] man in charge of the hearing on appeal as to any matter required of him pertinent to the appeal, and it shall be unlawful for him to fail or refuse so to do.

Section 20. Comptroller to Make Rules: The City Comptroller shall have the power, and it shall be his duty, from time to time, to adopt, publish and enforce rules and regulations not inconsistent with this ordinance or with law for the purpose of carrying out the provisions thereof, and it shall be unlawful to violate or fail to comply with, any such rule or regulation.

Section 21. Licenses—Posting—Unlawful Use of: All licenses issued pursuant to the provisions of this ordinance shall be kept posted by the licensee in a conspicuous place in his principal place of business in the City, except that all licenses for the operation of a vehicle shall be attached in a conspicuous place upon the right hand side of such vehicle in a suitable holder to be furnished by the City Comptroller upon the payment of a fee of Twenty-five ($.25) Cents.

No person to whom a license has been issued, pursuant to this ordinance, shall suffer or allow any other person chargeable with a separate license to operate under or display his license, nor shall such other person operate under or display such license.

Section 22. False Returns, etc.: It shall be unlawful for any person liable to tax hereunder to fail or refuse to make application or return for a license or to pay the fee or tax or installment thereof when due, or for any person to make any false or fradulent application or return or any false statement or representation in, or in connection with, any such application or return, or to aid or abet another in any

attempt to evade payment of the fee or tax, or any part thereof, or for any person to fail to appear and/or testify in response to subpœna issued pursuant hereto, or to testify falsely upon any investigation of the correctness of a [fol. 30] return, or upon the hearing of any appeal, or in any manner to hinder or delay the City or any of its officers in carrying out the provisions of this ordinance.

Section 23. Effect of Partial Invalidity: If any provision or section of this ordinance shall be held void or unconstitutional, all other parts, provisions and sections of this ordinance not expressly so held to be void or unconstitutional shall continue in full force and effect.

Section 24. Penalty: Any person violating or failing to comply with any of the provisions of this ordinance or any lawful rule or regulation adopted by the City Comptroller pursuant thereto, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine in any sum not to exceed Three Hundred ($300.00) Dollars, or by imprisonment in the City Jail for a term not exceeding ninety (90) days, or by both such fine and imprisonment.

Section 25. This ordinance shall take effect and be in force thirty days from and after its passage and approval, if approved by the Mayor; otherwise it shall take effect at the time it shall become a law under the provisions of the city charter.

Passed the City Council the 23rd day of May, 1932, and signed by me in open session in authentication of its passage this 23rd day of May, 1932.

James Scavotto, President pro Tem. of the City Council.

Approved by me this 25th day of May, 1932.

Philip Tindall, Acting Mayor.

Filed by me this 25th day of May, 1932.

Attest:

H. W. Carroll, City Comptroller and ex-Officio City Clerk, (Seal) by E. M. Street, Deputy Clerk. City Comptroller and ex-Officio City Clerk, by Deputy Clerk.

Published May 31, 1932.

[fol. 31] EXHIBIT "B" TO AMENDED COMPLAINT

To the City of Seattle, a municipal corporation; the Honorable City Council of the City of Seattle, Harry W. Carroll, Esq., Comptroller of the City of Seattle, and H. L. Collier, Esq., Treasurer of the City of Seattle:

Comes now Puget Sound Power & Light Company, a Massachusetts corporation, denying the validity of Ordinance No. 62662 and/or No. 62662 as amended of the City of Seattle and the authority of the City of Seattle to enact said ordinance and/or to require Puget Sound Power & Light Company to comply with all or any of the provisions thereof, and under protest, applies to the Comptroller of the City of Seattle for an "Occupation License" as required by Section 10 of said ordinance No. 62662 and/or No. 62662 as amended of the City of Seattle; under further protest files its return as provided thereby, and, under further protest pays herewith the sum of $9,697.75, as the first installment of the tax imposed by said ordinance under Section 5, Subdivision (c) thereof (Electric Light and Power).

The specific grounds upon which the Puget Sound Power & Light Company protests and objects are hereinafter set forth, and you are hereby notified that it will institute an appropriate suit or action to test the validity of said ordinance and the right of the city to require said return and license and to impose said tax, and also to recover said tax, with interest from date of payment.

The specific grounds upon which the Puget Sound Power & Light Company protests are as follows:

(1) Under the laws of the State of Washington the City of Seattle has no power or authority to enact and/or to enforce said ordinance and/or to impose upon protestant the license fee or tax provided therein.

(2) By reason of the direct and active competition existing between protestant and the City of Seattle in furnishing and selling electric light and power, the City of [fol. 32] Seattle may not lawfully extract from protestant the amount of the tax provided in the ordinance.

(3) The ordinance and the enforcement thereof as to protestant would deprive it of its property and property rights

without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 3, of the Constitution of the State of Washington.

(4) The ordinance and the enforcement thereof as to protestant would take its private property for a public use without just compensation, in contravention of the Fifth Amendment to the Constitution of the United States and Article I, Section 16, of the Constitution of the State of Washington.

(5) The ordinance and the enforcement thereof as to protestant would deny protestant equal protection of the law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

(6) The ordinance and the enforcement thereof as to protestant would impair the obligation of the Franchise granted to it by the City of Seattle and would impose upon protestant additional and unjust obligations which violate the terms of its franchise, in contravention of Article I, Section 10, of the Constitution of the United States.

(7) The ordinance and the enforcement of its terms as to protestant would take from protestant property rights and privileges lawfully vested in protestant under the franchise granted by the City of Seattle, without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 3, of the Constitution of the State of Washington.

(8) The tax sought to be imposed by the ordinance as to protestant is discriminatory, unjust, unfair, and so unreasonably high that the imposition thereof upon protestant would result in a confiscation of its property, in contravention of the due process clause of the Fourteenth [fol. 32½] Amendment to the Constitution of the United States.

(9) The ordinance unlawfully discriminates against protestant and in favor of the City of Seattle in that: (a) it does not require payment of said license fee or tax by the City of Seattle out of revenues received by it from the sale of electric light and power; (b) it provides no valid or other method whereby the fee or tax ostensibly imposed

upon the City of Seattle by said ordinance can be enforced, paid or collected, and to that extent is ineffective and wholly null and void; (c) the prior pledge of the gross revenues received by the City of Seattle from the sale of electric light and power to the payment of the revenue bonds of the city deprives the City of Seattle of any lawful right to divert from such gross revenues the amount of money necessary to enable the city to pay the fee or tax which the ordinance ostensibly requires the city to pay; (d) under the Seattle budget for 1932 any attempt by any officer or employe of the City of Seattle to pay said tax for the year 1932 out of the revenues of its lighting department would be in violation of the law of the State of Washington; and (e) while the ordinance and the enforcement thereof as to protestant would require actual payment by it of the fee or tax provided therein, the City of Seattle as to its similar competing utility business owned and operated by the city in its proprietary capacity is in fact and in law and by the terms of said ordinance exempt from payment of said fee or tax; that such classification is discriminatory, arbitrary, unreasonable, unreal, unfair and unlawful, and in contravention of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 3, of the Constitution of the State of Washington.

(10) The enactment of said ordinance constitutes an illegal attempt by the City of Seattle to regulate rates, charges, business and operations of protestant, in violation of the laws of the State of Washington, delegating such au- [fol. 33] thority solely and exclusively to the Department of Public Works of the State of Washington, and is an illegal attempt by the City of Seattle to usurp the functions and powers of said State Department.

(11) The City of Seattle has no power to compel protestant under penalty of fine and/or imprisonment, or both, as provided in said ordinance to make a return of its gross income, to pay said license fee or tax and to apply for and obtain a new and additional license to carry on its business as a condition precedent (a) to the exercise of the precise rights and privileges granted protestant in its franchise from the City of Seattle, and/or (b) as a condition precedent to protestant's lawfully rendering the service which as a public utility company it is legally required to render

to the public whether the license specified in said ordinance is granted or withheld by the City of Seattle.

(12) The penalties provided in said ordinance are excessive, oppressive, unusual and confiscatory and as such are in contravention of the Eighth Amendment to the Constitution of the United States and Article I, Section 14, of the Constitution of the State of Washington, and in excess of any penalty which the City of Seattle has power to impose.

(13) The Ordinance, if enforced as to protestant, would operate to extract from protestant the fee or tax provided therein, not only under the penalty provided in the ordinance but also, as provided in the prior franchise granted to protestant by the City of Seattle under the further penalty of having said franchise become subject to repeal by the City of Seattle, if protestant fails to operate its electric light and power system in the City of Seattle and or fails to operate said franchise and would unlawfully add an additional burden to said franchise and would thereby impair the obligation of said franchise, in contravention of Article I, Section 10, of the Constitution of the United States, and would deprive protestant of its property without due process of law, in violation of the due process clauses [fol. 34] of the Constitutions of the United States and the State of Washington.

(14) The license fee or tax provided by said ordinance is not levied in pursuance of law as required by Article VII, Section 5, of the Constitution of the State of Washington.

(15) The license fee or tax provided by said ordinance is not uniform in respect to persons and property within the jurisdiction of the City of Seattle as required by Article VII, Section 9, of the Constitution of the State of Washington.

(16) The method of appeal and review provided in said ordinance is indefinite, inadequate, unfair and unlawful in that it denies to protestant the right to a fair and impartial review of the determination of the City Council of the City of Seattle as to the amount of the fee or tax protestant may be required to pay, in contravention of the due process clause of the Fourteenth Amendment to the Constitution of

the United States and Article I, Section 3, of the Constitution of the State of Washington.

(17) The ordinance and particularly Section 2 thereof in which the term "gross income" is defined, is vague, indefinite and uncertain with respect to the amount of the tax to be paid and the manner by which the amount may be ascertained, to an extent that the taxpayer may not without litigation determine with any degree of certainty the amount of the tax he would owe, and is therefore invalid and unenforceable, even though the ordinance were not otherwise invalid.

Done this 1st day of July, 1932.

Puget Sound Power & Light Company, by Frank McLaughlin, President. Todd, Holman & Sprague and Clarence Innis, Attorneys for Puget Sound Power & Light Company.

Original filed July 1, 1932.

H. W. Carroll, City Comptroller and ex Officio City Clerk.

Comptroller's File No. 3

[fol. 35] *Duly sworn to by Frank McLaughlin. Jurat omitted in printing.*

Copy of within Received Sep. 19, 1932.

A. C. Van Soelen, Corporation Counsel.

[File endorsement omitted.]

[fol. 36] In Superior Court of King County

[Title omitted]

Motion to Strike from Amended Complaint—Filed Sept. 28, 1932.

Comes now the defendant above named and moves that the allegations and matters appearing in the amended complaint herein and hereinafter mentioned, be stricken, for the reason that the same are irrelevant and/or redundant:

I

All of the allegations and matters contained in paragraph VI of the first cause of action alleged in said amended complaint.

II

From Paragraph XV of the first cause of action alleged in said amended complaint the following allegations and matters: "and upon information and belief, based upon the form in which said ordinance was enacted as hereinbefore alleged and the failure of defendant to pay said license fee or tax, plaintiff alleges that defendant does not intend to pay and will not pay said license fee or tax or any part thereof".

III

All of the allegations and matters appearing in Paragraph XVI of the first cause of action alleged in said amended complaint.

[fol. 37]

IV

All of the allegations and matters appearing in Paragraph XX of the first cause of action alleged in said amended complaint.

V

All of the allegations and matters contained in Subparagraph (14) of Paragraph XXI of the first cause of action alleged in said amended complaint.

VI

From Paragraph I of the second cause of action alleged in said amended complaint all of the allegations and matters hereinabove mentioned.

A. C. Vansoelen, Corporation Counsel; Walter L. Baumgarten, Assistant, Attorneys for Defendant.

Received Sep. 28, 1932.

Todd, Holman & Sprague.

[File endorsement omitted.]

[fol. 38] IN SUPERIOR COURT OF KING COUNTY

[Title omitted]

ORDER ON DEFENDANT'S MOTION TO STRIKE FROM AMENDED COMPLAINT—Filed Oct. 5, 1932

This cause came on for hearing before the Honorable J. T. Ronald, one of the judges of the above entitled court, on the 30th day of September 1932, on motion of defendant to strike allegations appearing in plaintiff's amended complaint, plaintiff appearing at said hearing by Todd, Holman & Sprague and Clarence Innis, its attorneys, and defendant appearing by A. C. Van Soelen, corporation counsel, and Walter L. Baumgartner, assistant, and said motion was duly argued before the court by said counsel and the court being now duly advised therein.

It is hereby ordered that defendant's motion to strike the allegations and matters contained in Paragraph VI of plaintiff's first cause of action be and the same is hereby denied;

That defendant's motion to strike from Paragraph XV of plaintiff's first cause of action the allegation "and upon information and belief based upon the form in which said ordinance was enacted as hereinbefore alleged and the failure of defendant to pay said license fee or tax, plaintiff alleges that defendant does not intend to pay and will not pay said license fee or tax or any part thereof", be and the same is hereby denied;

[fol. 39] That defendant's motion to strike all the allegations appearing in Paragraph XX of plaintiff's first cause of action alleged in said amended complaint be and the same is hereby denied;

That defendant's motion to strike all allegations contained in sub-paragraph (14) of Paragraph XXI of plaintiff's first cause of action alleged in its amended complaint be and the same is hereby denied;

That defendant's motion to strike from Paragraph I of the second cause of action alleged in said amended complaint all of the allegations and matters hereinabove mentioned be and the same is hereby denied;

To all of which rulings denying defendant's motions to strike defendant excepts and its exceptions are hereby allowed.

That defendant's motion to strike all of the allegations and matters appearing in Paragraph XVI of the first cause of action alleged in plaintiff's amended complaint be and the same is hereby granted, to which order of the court plaintiff excepts and its exception is hereby allowed.

Done in open court this 5 day of October 1932.

J. T. Ronald, Judge.

Presented by Clarence Ennis.

[File endorsement omitted.]

[fol. 40] In Superior Court of King County

[Title omitted]

Demurrer to Amended Complaint—Filed Sept. 28, 1932

Comes now the above named defendant and demurs to the amended complaint in the above entitled action, for the reason that the same fails to state facts sufficient to constitute a cause of action, either at law or in equity.

A. C. Van Soelen, Corporation Counsel; Walter L. Baumgartner, Assistant, Attorneys for Defendant.

Received Sep. 28, 1932.

Todd, Holman & Sprague.

[File endorsement omitted.]

[fol. 41] In Superior Court of King County

[Title omitted]

Order Sustaining Demurrer to Amended Complaint and Denying Plaintiff's Motion for a Temporary Injunction—Filed Oct. 5, 1932

This cause came on for hearing before the Honorable J. T. Ronald, one of the judges of the above entitled court,

on the 30th day of September 1932, upon plaintiff's motion for a temporary injunction restraining defendant from the enforcement of Ordinance No. 62662 and/or No. 62662 as amended or any portion thereof, against plaintiff pendente lite, as prayed in plaintiff's amended complaint, and upon defendant's demurrer to said amended complaint, the plaintiff having appeared in court by its counsel, Todd, Holman & Sprague and Clarence Innis, and the defendant having appearing in court by its counsel, A. C. Van Soelen, corporation counsel, and Walter L. Baumgartner, assistant and the court having heard the arguments of counsel and being duly advised in the premises, announced that plaintiff would be granted a temporary injunction restraining defendant from the enforcement of said ordinance or any portion thereof against plaintiff pending the final determination of this litigation in the Supreme Court of the State of Washington, and that defendant's demurrer to said amended complaint would be sustained; whereupon, to [fol. 42] avoid the issues of said temporary injunction by the court, the said attorneys for defendant agreed to enter into a written stipulation, which is now on file herein, whereby subject to the terms of said written stipulation, defendant agreed to refrain from enforcing, or attempting to enforce the provisions of said ordinance against plaintiff pending the final determination of an appeal herein to the Supreme Court of the State of Washington.

Whereupon, by reason of the said stipulation of attorneys, for defendant, upon the validity of which and upon the good faith of defendant in making same, the court relies, plaintiff's motion for a temporary injunction is hereby denied to which plaintiff excepts and its exception is hereby allowed; and

It is hereby further ordered that defendant's demurrer to plaintiff's amended complaint be and the same is hereby sustained, to which ruling of the court plaintiff excepts and said exception is hereby allowed.

Done in open Court this 5 day of October, 1932.

J. T. Ronald, Judge.

Presented by: Clarence Innis.

[File endorsement omitted.]

[fol. 43] IN SUPERIOR COURT OF KING COUNTY

[Title omitted]

STIPULATION AS TO ENFORCEMENT PENDING FINAL DETERMINATION. Filed Oct. 5, 1932

It is hereby stipulated and agreed by and between the parties above named, by their respective counsel, under signed as follows:

Plaintiff agrees that it will immediately give notice of appeal to the Supreme Court of the State of Washington from an order to be entered herein dismissing plaintiff's amended complaint, and that it will diligently prosecute said appeal to the end that the same may be set for hearing by said court not later than the January 1933, term.

Defendant agrees that pending the final determination of said appeal by the Supreme Court of the State of Washington it will not enforce or attempt to enforce the provisions of Ordinance No. 62662 and/or Ordinance No. 62663 as amended, against the plaintiff.

This stipulation is entered into without prejudice to any right defendant may have to enforce said ordinance or ordinances against said plaintiff immediately upon the determination of the appeal by said court.

Both parties agree to use all diligence in the prosecution of such appeal.

Puget Sound Power & Light Company, a Corpo
[fol. 44] ration, by Todd, Holman & Sprague and Clarence Innis, Its Counsel. The City of Seattle, a Municipal Corporation, by A. C. Van Soelen, Corporation Counsel; Walter L. Baumgartner, Assistant, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 45] IN SUPERIOR COURT OF KING COUNTY

No. 255140

PUGET SOUND POWER & LIGHT COMPANY, a Corporation,
Plaintiff,

v.

THE CITY OF SEATTLE, a Municipal Corporation,
Defendant

JUDGMENT AND DECREE OF DISMISSAL—Filed Oct. 5, 1932

This cause came on for hearing before the Honorable J. T. Ronald, one of the Judges of the above entitled court, on this 5th day of October 1932, plaintiff appearing by Todd, Holman & Sprague and Clarence Innis, its attorneys, and defendant appearing by A. C. Van Soelen, corporation counsel, and Walter L. Baumgartner, assistant; and the court having entered an order on this date sustaining the demurrer of the defendant to plaintiff's amended complaint herein, to which order plaintiff duly excepted; thereupon said plaintiff by its said counsel gave notice in open court that it elects to stand upon the said amended complaint and declines to plead further;

Wherefore, by reason of the law and the premises, it is by the court considered, ordered and decreed that plaintiff's first cause of action and plaintiff's second cause of action, and each of them, be and each is hereby dismissed and that defendant go hence without day, and that defendant recover of plaintiff its costs and disbursements herein.

At the time of the signing of this judgment plaintiff duly excepted to the same and said exception is hereby allowed.

[fol. 46] Done in open court this 5 day of October 1932.

J. T. Ronald, Judge.

ORDER ALLOWING APPEAL

At the time the above and foregoing judgment and decree are entered and made the above named plaintiff in said cause by its said attorneys give notice in open court that it appeals from said judgment and decree and from each and every ruling of the court adverse to plaintiff, to the

Supreme Court of the State of Washington, and said appeal is hereby allowed, and the clerk of this court is directed to make an entry of said notice of appeal in the journal of the court.

Done in open Court this 5 day of October 1932.

J. T. Ronald, Judge.

Presented by Clarence Innis.

Judgment Number 118442. Entered in Execution Docket, Vol. 109, page 263.

[File endorsement omitted.]

[fol. 47] IN SUPREME COURT OF WASHINGTON

En Banc

No. 24296

PUGET SOUND POWER & LIGHT COMPANY, a Corporation, Appellant,

v.

THE CITY OF SEATTLE, a Municipal Corporation, Respondent

OPINION—Filed Apr. 21, 1933

This is a companion case to Pacific Telephone & Telegraph Co. v. City of Seattle, — Wash. Dec. —; and, like that case, is here on appeal by plaintiff from a judgment of dismissal after a demurrer to the amended complaint had been sustained. The assignments of error are:

"I. The court erred in sustaining respondent's demurrer to appellant's amended complaint.

"II. The court erred in dismissing appellant's first cause of action.

"III. The court erred in dismissing appellant's second cause of action.

"IV. The court erred in failing to hold that the enforcement of the ordinance as to appellant would contravene

article I, § 10, and the Fifth and Fourteenth Amendments to the Constitution of the United States, and article I, §§ 3, 14 and 16, and §§ 5 and 9 of article VII of the Constitution of the State of Washington."

The following provisions of ordinance No. 62,662, in addition to those set out in the opinion in the Telephone Co. case, are pertinent to the questions raised by the appellant in this case:

"Section 5. • • •

"(c) Upon every person engaged in or carrying on the business of selling or furnishing electric light and power a fee or tax equal to three per cent (3%) of the total gross income from such business in the city during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than Two Hundred Fifty ($250.00) Dollars per tax year."

"Section 6. City of Seattle, Subject to Tax: Subdivisions (b) and (c) of Section 5 shall, so far as permitted by law, be applicable to the city of Seattle, except that said city shall not as a taxpayer, be required to conform to the other provisions of this ordinance."

[fol. 48] The appellant raises some twenty-seven objections to the ordinance, all of which were disposed of in the Telephone Co. case, with the exception of two. These are: (1) That the tax is in contravention of appellant's rights under its franchise from the city; and (2) that the tax is peculiarly discriminatory, unreasonable and confiscatory, as to it, by reason of the fact that the city, in its proprietary capacity, is a competitor of appellant in the power and light business.

I. The Fourteenth Amendment of the state constitution provides: "The power of taxation shall never be suspended, surrendered or contracted away." This, however, does not answer appellant's first contention, since its franchise antedates the amendment. Whether or not the State or a municipality may barter away its taxing power is a question upon which the authorities generally are not in harmony. There are strong reasons why it should be held that it may not. State v. Hannibal & St. Joseph R. R. Co., 75 Mo. 208; City of Portland v. Portland Ry., Light &

Power Co., 156 Pac. 1058. For the purposes of this case, however, we do not find it necessary to pass upon that question, for, in any event, the intent to relinquish the power to tax must not only be clear but distinctly expressed. It is a doctrine that is indulged in no implications. The question is put and the rule concisely stated in City of St. Louis v. United Railways Co., 210 U. S. 266, as follows:

"The theory, then, upon which the bill was framed and this case decided was that the city, having once fixed a price for the use of its streets, which the railway companies had agreed to pay, there was no right to impose a license tax upon the railway companies under the ordinance. * * *

"The principles involved in this case have been the subject of frequent consideration in this court, and while it can be no longer doubted that a State or municipal corporation, acting under its authority, may deprive itself by contract of the power to exercise a right conferred by law to collect taxes or license fees, at the same time the principle has been established that such deprivation can only follow when the State or city has concluded itself by the use of clear and unequivocal terms. The existence of doubt in the interpretation of the alleged contract is fatal to the claim of exemption."

No terms of appellant's franchise have been called to our attention which could be interpreted as a relinquishment by the city of any of its powers of taxation.

[fol. 49] II. In principle, appellant's second proposition is akin to the first. The question is: Can the State's power of taxation be abridged or abrogated by estoppel? In the abstract, the question would seem to merit scant consideration; but the allegations of the amended complaint reveal a condition of unfair competition, created by the exaction of this tax from the appellant, which commands the careful attention of a court of equity.

The city, in its proprietary capacity, is in competition with appellant in the power and light business. The possible consequences to appellant, if it is subjected to an excise of three per cent on its gross revenues, while its competitor escapes the burden, are too obvious for discussion. Evidently having such consequences in mind, the city council, by virtue of § 6 of the ordinance, has undertaken to

subject the city's power and light business to the tax imposed upon persons and corporations engaging in that business. This is merely a more or less friendly gesture. The city has not allocated, and probably cannot allocate, any of the revenues of its power and light business to the payment of such a tax. Bonds have been issued in excess of $30,000,000 against the revenues from that business; and those bonds are a prior lien on the entire income from it—taking precedence even over operating charges. Conceding that the city's light and power revenues could be subjected to the tax, no machinery is set up in the ordinance to accomplish such an end. Furthermore, in making up its budget for 1932, no provision was made for the levy of general taxes to cover the excise provided for in the ordinance. So the problem must be met as though § 6 had been omitted from the ordinance; as though the city had levied the excise on the appellant and exempted its own light and power business therefrom.

Conceding, for the sake of argument, that to be the situation, counsel for the city seek to sustain the tax against [fol. 50] appellant under the doctrine that constitutional limitations on the taxing power do not prevent a reasonable classification of persons and occupations subject to the tax; and that a privately owned light and power business is subject to a different classification than one owned by a municipality—that the one may properly be subjected to the excise and the other exempted.

In passing, it is to be noted that the ordinance is a good faith exercise by the city of its power to impose excise taxes for the purpose of raising revenue. Some half dozen businesses enjoying peculiar privileges in and upon the streets of the city are included within its purview. The fact that it imposes a burden upon appellant not borne by the city in its competing business, is an incident and not the purpose of the ordinance.

The expediency of imposing excise taxes and the classification of persons and occupations affected is a legislative problem, so long as the exaction is not inherently oppressive and the classification is reasonable. As we have seen, in the case of Pacific Tel. & Tel. Co. v. City of Seattle, — Wash. Dec. —, the tax imposed by this ordinance is not inherently oppressive. The question here is whether the classification as between the appellant and the city, in its

ownership in a proprietary capacity of a light and power business, is reasonable. In the case of State Board of Tax Commissioners of Indiana v. Jackson, 283 U. S. 527, Mr. Justice Roberts said:

"The principles which govern the decision of this cause are well settled. The power of taxation is fundamental to the very existence of the government of the States. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations. Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232; Southwestern Oil Co. v. Texas, 217 U. S. 114; Brown-Forman Co. v. Kentucky, 217 U. S. 563. The fact that a statute discriminates [fol. 51] in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction, American Sugar Rfg. Co. v. Louisiana, 179 U. S. 89, or if any state of facts reasonably can be conceived to sustain it. Rast v. Van Deman & Lewis Co., 240 U. S. 342; Quong Wing v. Kirkendall, 223 U. S. 59. As was said in Brown-Forman Co. v. Kentucky, supra, at p. 573:

"'A very wide discretion must be conceded to the legislative power of the State in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law.'

"It is not the function of this Court in cases like the present to consider the propriety or justness of the tax, to seek for the motives or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great. The past decisions of the Court make this abundantly clear."

In the case of South Carolina Power Co. v. South Carolina Tax Commission, 52 Fed. (2d) 515, a statutory three judge court applied this rule to the identical problem with

which we are here confronted. An act of the legislature, imposing an excise on persons and companies generating electricity by hydroelectric and steam power, was under consideration. The act contained the following proviso:

"Provided, further, That the provisions of this Act shall not apply to municipalities manufacturing or generating electricity for the use of its customers."

In answer to the contention that this was an unreasonable classification, Mr. Justice Parker, speaking for the court, said:

"So far as the exemption accorded municipalities is concerned, a municipality is an agency of the state, and its operations are conducted, not for private profit, but for the benefit of the public or its citizens. Irvine v. Town of Greenwood, 89 S. C. 511, 72 S. E. 228, 36 L. R. A.-(N. S.) 363. Its property and business conducted by it are ordinarily not taxed at all; and legislation of the state taxing or exempting same from taxation is not open to the objection that it offends the equal protection clause of the Fourteenth Amendment. See Village of Hardwick v. Wolcott, 98 Vt. 343, 129 A. 159, 39 A. L. R. 1222 and note."

Appellant, in support of its position, cites three cases: Texas Electric Service Co. v. City of Seymour, 54 Fed. (2d) 97; Great Northern Utilities Co. v. Public Service [fol. 52] Commission, 52 Fed. (2) 802; Los Angeles Gas & Electric Co. v. City of Los Angeles, 241 Fed. 912 (affirmed 251 U. S. 32). In none of these cases was the taxing power involved. In each it is held that the municipality could not, under the guise of an exercise of its police power, impose an oppressive regulation upon a competitor in a business in which the municipality itself was engaged. These cases do not go to the extent of holding that estoppel can be invoked against the State or a municipality in the legitimate and necessary exercise even of the police power.

The applicability of the doctrine of estoppel to the exercise of the police power has been effectively denied in a number of cases. New Orleans Gas Light Co. v. Drainage Commission of New Orleans, 197 U. S. 453; New York and N. E. Railroad Co. v. Bristol, 151 U. S. 556; Butchers' Union etc. Co. v. Crescent City etc. Co., 111 U. S. 746;

Stone v. Mississippi, 101 U. S. 814; Beer Co. v. Massachusetts, 97 U. S. 25. In the latter case it is said:

"If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State. * * *

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi subprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

In New York & N. E. Railroad Co. v. Bristol, supra, the rule is stated as follows:

"It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal [fol. 53] protection of the laws, by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury."

If this be true of the police power, the exercise of which depends upon the existence of government, it must be equally true of the taxing power upon which the very existence of government depends. The doctrine of estoppel, applied to the power of taxation, is inconsistent with any conception of government, for, carried to the ultimate, it

would result in the destruction of the State. South Carolina v. United States, 199 U. S. 437. See, also, Everett v. Adamson, 106 Wash. 355, 180 Pac. 144.

The judgment is affirmed.

Blake, J.

We concur:

Beals, C. J. Holcomb, J. Millard, J. Mitchell, J. Main, J.

Tolman, J., took no part.

[fol. 54] IN SUPREME COURT OF WASHINGTON

No. 24296

DISSENTING OPINION

STEINERT, J., dissenting:

As stated in the majority opinion, this is a companion case to Pacific Telephone & Telegraph Co. v. City of Seattle, — Wash. Dec. —, — P. (2d) —. All but two of this appellant's objections to the ordinance in question were disposed of in that case. My dissent in that case applies with equal force here. Since the majority opinion discusses and disposes of the two additional questions, my dissent is likewise extended, inasmuch as I disagree with the majority upon both questions.

The first question deals with appellant's rights under its existing franchise. The appellant here already had a complete and unqualified operating franchise from the city to engage in and carry on the business of selling and furnishing electric light and power for hire in the city of Seattle until March 14, 1952. By virtue of that franchise it had the express right to construct, maintain and operate its equipment and apparatus and to erect poles, wires and appurtenances for the distribution of electric light, heat and power in, over and under the streets and public places of the city. The grant was subject to repeal, change or modification for failure to operate in accordance with the provisions of the ordinance, or at all. Relying upon that franchise, the appellant made large investments of money installing its plant and equipment and building up its

service. It is now under the burden and duty of continuous operation. Its property is devoted to a public use. It can not cease its operations, nor has the city power to authorize it to cease doing business. A fortiori the city can not alter or amend the contract to the detriment of the grantee by the imposition of additional burdens. Pacific Tel. & Tel. Co. v. Everett, 97 Wash. 259, 166 Pac. 650; Hot [fol. 55] Springs Electric Light Co. v. City of Hot Springs, 70 Ark. 300, 67 S. W. 761; Los Angeles v. Los Angeles Gas & Electric Corp., 251 U. S. 32, 64 L. Ed. 121; McQuillin, Municipal Corporations, Vol. 2, § 806.

In the Everett case, after stating that the municipality may, as a condition precedent to the use of its property, exact of the user such terms and conditions as it may deem necessary to impose, we said on p. 269:

"But it does not follow that the city may grant a franchise to a corporation to use its streets and other public places upon terms mutually agreed upon, and then afterwards during the life of the franchise annex additional burdens thereto without the consent of the grantee inconsistent with the rights granted. While it may not surrender the right of regulation necessary to the public health and safety, or the general taxing power (Const., art. 7, § 4), it can make a valid and binding contract concerning the terms upon which the grantee may make use of public places; such a contract as cannot be changed or altered at the will of the city without the consent of the other party thereto."

The crowning reason, in my opinion, for holding the ordinance inoperative and void as to this appellant is that it constitutes an unlawful exercise by the city of a governmental power in aid of its proprietary business. The city is a competitor of the appellant. Both are engaged in a similar business for profit. The appellant's franchise is not exclusive, hence it can not complain of competition. It may not even complain if the city should see fit to appropriate its property for public use by condemnation. But so long as appellant is permitted to function as a competitor, its property may not be taken from it without due process of law, and that, in effect, is just what the ordinance does. The validity of the tax must be determined by its true operation and effect on the basis of the results

which follow its operation. Aberdeen Savings & Loan Ass'n v. Chase, 157 Wash. 351, 289 Pac. 536; Educational Films Corp. v. Ward, 282 U. S. 379, 75 L. Ed. 400.

In practical operation, the appellant must not only meet the competitive rates established by the city, but it must also comply with the regulations made by the Department of Public Works regarding its rates. The city is under no [fol. 56] such regulation, but has exclusive control of its own rates. If the appellant had no competition, it might secure from the state department the right to pass on to its customers the amount of the tax, upon a showing that its rate of return was insufficient to enable it to pay such tax. That attempt, however, would be futile so long as the city maintained a lower standard of rates. By the ordinance the city has the right of inspection of appellant's books of account. If the power to enforce such a tax as prescribed by the ordinance be granted to the city, then the amount thereof can be fixed as the city pleases, and at such a figure as it may determine from appellant's own books will result in the elimination of appellant as a competitor. Contrary to the view of the majority, I think that the following cases are applicable and controlling here, both as authority and in reason: Texas Electric Service Co. v. City of Seymour, 54 Fed. (2d) 97; Great Northern Utilities Co. v. Public Service Commission, 52 Fed. (2d) 802; Los Angeles Gas & Electric Co. v. City of Los Angeles, 241 Fed. 912 (affirmed in 251 U. S. 32). In the case last cited, the District Judge, on p. 921, said:

"I am, however, also firmly of the belief that until the city, by purchase, appeal to eminent domain, or otherwise, has lawfully and properly and justly eliminated competition, it must meet its competitors as any other private agency would be compelled to meet them, and must stand with them in the same relation to the law, and let its success be measured by its ability satisfactorily to serve the public, rather than by its power through the exertion of public functions to occupy a position of supremacy in the field which it deliberately has chosen to invade."

If this ordinance be upheld, it will result in appellant being required to pay to the city approximately one hundred and twenty thousand dollars a year out of its gross earnings for the privilege of transacting business; while

the city, even under the majority opinion, is entirely relieved of that handicap. It would therefore profit directly at the expense of its competitor. The city having entered into a field of competition in its proprietary capacity, enters it under the law of the survival of the fittest, and [fol. 57] may not, therefore, draw sustenance from its competitor through an assumption of public and governmental functions, to the strangulation of the one with whom it voluntarily competes.

I therefore dissent.

Steinert, J.

[fol. 58] IN SUPREME COURT OF WASHINGTON

En Banc

No. 24327

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a Corporation, Appellant,

v.

THE CITY OF SEATTLE, a Municipal Corporation, and HARRY W. CARROLL, as Comptroller of the City of Seattle, Respondents

OPINION—Filed Apr. 21, 1933

The plaintiff brought this action to enjoin the defendant from collecting a license tax under ordinance No. 62,662, being entitled:

"An ordinance relating to, and providing for, a license or occupation tax upon certain businesses, occupations, pursuits and privileges; defining offenses and providing penalties."

A demurrer interposed to the amended complaint was sustained. The plaintiff, electing to stand on the pleading, appeals from a judgment dismissing the action and assigns error as follows:

"I. The court erred in sustaining respondents' demurrer to appellant's amended complaint.

"II. The court erred in dismissing appellant's cause of action.

"III. The court erred in failing to hold that the enforcement of the ordinance as to appellant would contravene the Fourteenth Amendment to the Constitution of the United States, and article I, § 3, and article VIII, § 9, of the constitution of the state of Washington."

The pertinent provisions of the ordinance are:

"Section 1. Exercise of Revenue License Power: The provisions of this ordinance shall be deemed an exercise of the power of the City of Seattle to license for revenue."

"Section 2. * * * Gross Income: The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real proprty or any interest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness or stocks and the like) and without any deduction on [fol. 59] account of the cost of the property sold, the cost of materials used, labor, costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses."

"Section 5. Occupations Subject to Tax—Amount: There are hereby levied and shall be collected annual license fees or occupation taxes against the persons on account of the business activities, and in the amounts to be determined by the application of the rates against gross income as follows:

"(a) Upon every person engaged in or carrying on a telegraph and/or telephone business, a fee or tax equal to four per cent (4%) of the total gross income from such business in the city during his fiscal year next preceding the tax year for which the license is required; provided however, that the minimum fee or tax shall not be less than One Thousand ($1,000.00) Dollars per tax year."

The appellant sets up some twenty-one separate grounds or reasons why the tax sought to be collected from it under the ordinance is invalid. For the purposes of this discus-

sion, these may be classified into five groups: (1) That the city has no power to levy such a tax; (2) that the state has preempted this field of taxation; (3) that the definition of "Gross Income" is so indefinite and uncertain that neither the income subject to the tax nor the amount thereof can be ascertained; (4) that the tax is unreasonable, oppressive and confiscatory; and (5) that the tax is in contravention of appellant's rights under the Act of Congress of July 24, 1866, known as the Post Roads Act.

I. It is first contended that there is no grant of power from the state to the city to levy such a tax. The power, under which the right to levy the tax is asserted, is found in Rem. Comp. Stat., §§ 8966 and 8981.

Section 8966 relates to the powers of cities of the first class, and, among other things, provides:

"Any such city shall have power—

* * * * * * *

"33. To grant licenses for any lawful purpose, and to fix by ordinance the amount to be paid therefor, and to provide for revoking the same; Provided, that no license shall be granted to continue for longer than one year from the date thereof; * * *"

Section 8981 provides:

[fol. 60] "Any city adopting a charter under the provisions of this act shall have all the powers which are now or may hereafter be conferred upon incorporated towns and cities by the laws of this state, and all such powers as are usually exercised by municipal corporations of like character and degree, whether the same shall be specifically enumerated in this act or not."

This court has held in numerous cases that cities and towns, under the powers granted, have the right to impose license taxes either for the purpose of regulation or revenue. Fleetwood v. Read, 21 Wash. 547, 58 Pac. 665, 47 L. R. A. 205; Walla Walla v. Ferdon, 21 Wash. 308, 57 Pac. 796; Stull v. DeMattos, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892; In re Garfinkle, 37 Wash. 650, 80 Pac. 188; Town of Sumner v. Ward, 126 Wash. 75, 217 Pac. 502; Town of Bucoda v. Swaney, 163 Wash. 45, 299 Pac. 632.

Speaking of the grant of power contained in subdivision 33, § 8966, supra, in the Fleetwood case, Judge Dunbar said:

"This provision is in relation to cities of the first class. * * * The language is comprehensive. The authority is to grant licenses for any lawful purpose, and, in the absence of restriction, the purpose of raising revenue is as lawful as the purpose of exercising the police power. This interpretation is borne out, we think, by the authorization of the legislature to cities of other classes. * * * And so the power to license for purposes of revenue is especially granted to all the other classes of cities."

We think that, by virtue of § 8981, supra, the power to license for purposes of revenue is also "especially granted" to cities of the first class. In any event, subdivision 33 of § 8966 has been uniformly construed to confer such power. Pacific Tel. & Tel. Co. v. Everett, 97 Wash. 259, 166 Pac. 650.

II. It is contended that, conceding the power, the city is precluded from exercising it, because the state has preempted this field of taxation. With respect to police powers, it is a rule of universal application that a municipality may not enact regulatory ordinances upon subjects covered by state legislation. State ex rel. Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861; Seattle Electric Co. v. Seattle, 78 Wash. 203, 138 Pac. 892. Whether this rule is applicable in cases involving the exercise of the taxing [fol. 61] power, it is not necessary for us to determine, because the state had not entered this field of taxation at the time the ordinance in question was enacted.

It must be kept in mind that the power granted to the city to issue licenses is dual: (1) for regulation; (2) for revenue. The power here exercised is for revenue and not for regulation. Here the granting of the license is an incident to the power to raise revenues. The license is the means, not the end. It is the method provided for raising the revenues. The penalty provided is merely a mode of enforcing payment, and the license is only a receipt for the tax. Home Insurance Co. v. City Council, 93 U. S. 116. The tax is an excise. It is levied upon the right to do business, not upon the right to exist; nor upon the property. The cases relied upon by appellant on this point

so characterize such a tax. State ex rel. Zielonka v. Carrel, 124 N. E. 134; Cincinnati v. American Telephone & Telegraph Co., 147 N. E. 806; Firestone v. Cambridge, 148 N. E. 471.

In I Cooley on Taxation (4th ed.), § 26, it is said:

"One distinction between a tax upon a business * * * and a license is said to be that the former is exacted by reason of the fact that the business is carried on * * * within the jurisdiction of the taxing power, and the latter is required as a condition precedent to the right to carry on such business * * * within the jurisdiction.' So it has been said that a charge cannot be deemed a license rather than a tax unless the payment thereof confers some right or privilege upon the person charged which otherwise would not exist."

A license is granted under the police power; an excise is imposed under the taxing power. The former is essentially not a tax at all. I Cooley, Taxation (4th ed.), § 26.

"The distinction between a demand of money under the police power and one made under the power to tax is not so much one of form as of substance. The proceedings may be the same in the two cases, although the purpose is essentially different. The one is made for regulation and the other for revenue. If for regulation, it is an exercise of the police power while if for revenue it is an exercise of the taxing power." I Cooley, Taxation (4th ed.), § 27.

[fol. 62] Bearing this distinction in mind, we shall examine briefly the statutes, by virtue of which appellant contends that the state has preempted the field of taxation covered by the ordinance,

Laws of 1929, chapter 107, requires public utility companies, subject to regulation as to rates and charges by the department of public works, to "pay to the department of public works a fee of 1/10 of one per cent of such gross operating revenue. * * *" This act is amendatory of § 1 of chapter 107 of the Laws of 1923, which in turn was amendatory of §§ 1 and 3 of chapter 113 of the Laws of 1921. The earlier laws fixed flat rates, determined by gross earnings, ranging from five dollars to $1,500.

Laws of 1921, chapter 113, § 1, refers to persons and corporations required to file statements with the director of

public works under § 78, chapter 117, Laws of 1911, and requires them to pay "a fee" in accordance with a fixed schedule. Section 2, chapter 113, Laws of 1921, then provides:

"All sums collected by the director of public works under the provisions of this act shall within thirty days after their receipt be paid to the state treasurer, and by him deposited in a *fund to be known as the public service revolving fund.*"

Chapter 117, Laws of 1911, is the public service commission law, and is purely a regulatory act. State ex rel. Webster v. Superior Court, 67 Wash. 37, 120 Pac. 861; Seattle Electric Co. v. Seattle, 78 Wash. 203, 138 Pac. 892. Obviously, chapter 107, Laws of 1929, chapter 107, Laws of 1923, and chapter 113, Laws of 1921, are adjuncts to this act. It is equally obvious, from the words which we have italicized in § 2 of the latter act, that the fund created was solely for the purpose of defraying the expense attendant to the adminstration of the public service commission law. We think it is clear, from the entire context of the act of 1921, that the purpose of it was regulatory. The raising of the rates in the act of 1923 and the changing of the method [fol. 63] of computation of the fee to be paid in the act of 1929 have not changed its character.

It is further contended that by chapter 227, Laws of 1929, the state has preempted this field of taxation. That act is entitled, "An Act relating to fees of foreign and domestic corporations * * *," and the tax exacted has been held to be a license fee to which corporations are subjected for the privilege of doing business in this state in a corporate capacty—as a corporate entity. In Spokane International Ry. Co. v. State, 162 Wash. 395, 299 Pac. 362, construing this act, it is said:

"The tax is upon the privilege the state grants to the corporation to engage in commerce with the advantages derived from a corporate organization, not upon the commerce itself."

III. That "Gross Income" is a proper basis for determining the amount of the tax to be paid, is well established by the authorities. I Cooley, Taxation (4th ed.), § 42; State v. Minnesota & International R. Co., 118 N. W. 679; State v. Central Trust Co., 67 Atl. 267; People ex rel. Westchester

Lighting Co. v. Gaus, 92 N. E. 230; State v. United Electric Light & Water Co., 97 Atl. 857; Nebraska Telephone Co. v. Lincoln, 117 N. W. 284. The definition of "Gross Income," contained in the ordinance, is substantially the same as that contained in the act of West Virginia, considered in the case of Hope Natural Gas Co. v. Hall, State Tax Commissioner, 274 U. S. 284. The tax challenged in that case was sustained. It would be practically impossible to define "Gross Income" so that more or less pertinent objections could not be aimed at the definition. We are satisfied, however, that the objections raised by appellant are more fancied than real; and that, in practical application, under present day systems of accounting, appellant will have no serious difficulty in ascertaining the amount of tax it is required to pay. The task of segregating revenues derived without the city from those derived within, affords no legal [fol. 64] objection to the tax. Western Union Tel. Co. v. Fremont, 58 N. W. 415; Postal Telegraph Cable Co. v. Charleston, 153 U. S. 692.

IV. It is next contended that the tax is unreasonable, oppressive and confiscatory. "The power to tax carries with it the power to destroy," has been so frequently stated that it has become axiomatic. Yet, practically, the power to tax is limited to what is reasonable. Oppressive or confiscatory taxes ordinarily will not be sustained. But whether a tax is reasonable is primarily a legislative problem, and the courts will not hold a tax invalid on the ground that it is oppressive or confiscatory unless there is clear abuse of the power conferred. It is said in IV Cooley, Taxation (4th ed.), § 1714:

"Where an excise tax is imposed for revenue, as distinguished from a fee imposed merely for regulation, the extent of the tax, when not limited by the grant itself, must be understood to be left to the judgment and discretion of the municipal government, to be determined in the usual mode in which its legislative authority is exercised; but the grant of authority to impose fees for the purposes of revenue does not warrant their being made so heavy as to be prohibitory, thereby defeating the purpose, where the business or occupation is a useful and lawful one, although there is some authority apparently to the contrary which would preclude a court from considering the amount of the tax in any case.

So far as the right to engage in a business of a harmless and useful character is concerned, 'the state may not impose an occupation tax which shall operate as a prohibition or as a burden of magnitude sufficient to render the right valueless.' But a tax for revenue possibly may be made so large as to be prohibitive, where the occupation may be prohibited, although in such a case the fee ordinarily is deemed an exercise of the police power rather than of the taxing power."

This rule has been stated by this court. Stull v. De Mattos, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892; In re Garfinkle, 37 Wash. 650, 80 Pac. 188.

In Nebraska Telephone Co. v. Lincoln, 117 N. W. 284, a levy of two per cent of gross earnings was upheld. A tax of five per cent was sustained in Lincoln Traction Co. v. Lincoln, 121 N. W. 435. In City of St. Louis v. United Rys. Co., 174 S. W. 78, a tax was levied, and upheld, on each car used for transporting passengers, at the rate of one mill [fol. 65] for every passenger carried. A tax of two per cent on gross receipts was upheld in Southwestern Oil Co. v. State of Texas, 217 U. S. 114. In that case, quoting from Delaware Railroad Tax Cases, 18 Wall. 206, the court said:

"* * * 'it is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction.' "

We do not think the rate fixed by the ordinance is unreasonable, oppressive or confiscatory.

V. Appellant next contends that, under the act of Congress of July 24, 1866 (14 Statutes L. 221), it has the right to occupy the streets without the city's consent. Conceding this right, it does not impair the city's power to levy taxes on the beneficiaries of the act. In Williams v. Talladega, 226 U. S. 404, it is said:

"These cases, taken together, establish the proposition that the privilege given under the terms of the act to use the military and post roads of the United States for the poles and wires of the company is to be regarded as permissive in character and not as creating corporate rights and privi-

leges to carry on the business of telegraphy, which were derived from the laws of the State incorporating the company, and that this permissive grant did not prevent the State from taxing the real or personal property belonging to the company within its borders or from imposing a license tax upon the right to do a local business within the State."

The demurrer to the amended complaint was property sustained, and the judgment is affirmed.

Blake, J. Main, J.

We concur:

Beals, C. J. Holcomb, J. Millard, J. Mitchell, J.

Tolman, J., took no part.

[fol. 66] IN SUPREME COURT OF WASHINGTON

No. 24327

DISSENTING OPINION

STEINERT, J., dissenting:

I cannot agree with either the reasoning or the result of the majority opinion. It is to be borne in mind that the case is before us on the amended complaint, a demurrer thereto which was sustained, and a judgment dismissing the action.

The amended complaint is too long to be set forth in its entirety; a brief summary of it must suffice. Its allegations may be reduced to the following statement: Appellant is a California corporation and as such has complied with the laws of this state relating to foreign corporations. It owns and operates a telephone and telegraph system and does both an intrastate and interstate business. For the sake of convenience and adequate service to its patrons, it has divided the state of Washington into a number of exchange areas. The "Seattle exchange area" includes several thousand telephones outside the limits of the city of Seattle. Service between telephones within the same exchange area is designated "telephone exchange service"; the service between telephones located in different exchange areas is designated "telephone toll service". The company's ac-

counts are kept in accordance with forms prescribed by the Interstate Commerce Commission and the Department of Public Works of Washington. The company has a central office equipment in Seattle having a value in excess of ten million dollars. Through its central office is rendered not only exchange service within the Seattle exchange, but also toll service, both intra-state and interstate. The company also has central office equipments in the other exchange areas throughout the state, aggregating in value about twenty million dollars. The company's business in the city of Seattle, according to the amended complaint, has at all times been conducted in an efficient and economical [fol. 67] manner. Its net earnings derived from its business in the Seattle exchange during the first three months of 1932, stated in rate per cent annual return upon the cost of its property used and useful in furnishing service within the exchange, were not in excess of 3.25%; its net earnings from business wholly within the city's limits were somewhat less. Subsequent to the first three months of 1932, the net earnings declined, and conditions existing at the time that the action was commenced indicate a probable further decline. The company has paid all its taxes for the years prior to 1931. In 1932 it paid taxes, for 1931, on its real estate inside the city, in the sum of $96,908.41, of which the city received $44,164.01 as its proportion. The company also paid $302,390.97 as the first half of 1931 personal property taxes, of which the city received $126,664.52. The remaining half became payable after this action had been commenced.

It is alleged in the amended complaint that the company was licensed by the state of Washington to engage in the telephone and telegraph business in and throughout the state, including the city of Seattle, for which license it paid the state, in 1932, a fee of $12,777.11; that the duty to give telephone service in Seattle and elsewhere in the state is a continuous one and cannot be terminated except with the consent of the state; and that for more than twenty-one months last past the company has not earned a fair return upon its property, and that the tax is arbitrary, unreasonable and confiscatory. The demurrer, of course, admits these allegations.

My first reason for dissent is that under the allegations of the amended complaint a prima facie case is stated. Not

only is it directly alleged that the license fee is arbitrary, unreasonable and confiscatory, but sufficient facts to support the allegation, if it be considered as a mere conclusion, are also stated. We can not disregard those facts or the issue tendered thereby. If the city can fix the rate at four [fol. 68] per cent, it can also fix it at ten. It is as easy to specify the one as it is the other. There is no innate virtue in the figure four, nor any inherent vice in the figure ten. We cannot say, nor are we privileged to say, dogmatically, that a fee of four per cent, as prescribed by the ordinance, is not unreasonable or confiscatory, or that a fee of ten per cent would be. It will require evidence, probably of an expert nature, to show what the actual situation is, and, until that evidence is produced, we cannot prejudge it. The demurrer should have been overruled for this reason alone, if for no other.

But I go further. The ordinance is not regulatory, but simply one for revenue. Not only does the ordinance declare it to be a revenue measure, but its very terms make no provision for regulation. This much is conceded in the majority opinion. The question then presents itself: Has the city the right to compel the company to obtain a license from it and to pay a tax or fee therefor before it can continue to carry on its business within the city?

Section 3 of the ordinance provides that after July 1, 1932, no person may engage in any business, occupation, pursuit or privilege for which a license fee or tax is imposed, without a license; that any taxpayer who carries on his business without such license shall be guilty of a violation of the ordinance for each day that the business is carried on or conducted. Section 24 provides that any person failing to comply with any of the provisions of the ordinance shall be guilty of a misdemeanor, punishable by a fine in any sum not to exceed three hundred dollars or by imprisonment in the city jail for a term not exceeding ninety days, or by both such fine and imprisonment.

If the city cannot compel the taking out of a license, then it cannot impose the tax. In the case before us the company had, under chapter 227, Laws of 1929, § 5, Rem. Rev. [fol. 69] Stat., § 3836-5, paid the state the sum of over twelve thousand dollars for the privilege of doing business in the state of Washington, for the year 1932. The privilege so obtained was comprehensive and subject to no

limitations. The city could not give the company something that it already had; nor, conversely, could it take away or withhold a right that the company then possessed. The sovereign having granted the right, the city could not withdraw it. Since it could not take it away, it cannot hamper its exercise in the manner attempted. Mayor and Aldermen of Savannah v. Georgia, 36 Ga. 460; Reser v. Umatilla County, 48 Ore. 326, 86 Pac. 595; Cooley on Taxation, 4th Ed., § 1691. A license is simply the authority to conduct a business or pursue a calling, or the right conferred by the municipality which makes the pursuit lawful and without which it would be unlawful. The appellant having been authorized by the state to conduct its business within the state, the city cannot make that pursuit unlawful.

The majority opinion cites the following cases in support of the rule that cities and towns may impose taxes either for revenue or regulation: Fleetwood v. Read, 21 Wash. 547, 58 Pac. 665; Walla Walla v. Ferdon, 21 Wash. 308, 57 Pac. 796; Stull v. De Mattos, 23 Wash. 71, 62 Pac. 451; In re Garfinkle, 37 Wash. 650, 80 Pac. 188; Town of Sumner v. Ward, 126 Wash. 75, 217 Pac. 502; Town of Bucoda v. Swaney, 163 Wash. 43, 299 Pac. 652. Those cases do announce that rule, it is true, but neither they nor the rule therein announced are applicable here, for the reason that in none of those instances had the state previously granted the privilege. Consequently, the municipality there had the right to exact a license for the conduct of the business, and the payment of a tax therefor. If the parties did not care to engage in business on the terms exacted, they could either have refrained from entering upon it or else with-
[fol. 70] draw if they had already begun. The situation here is not at all comparable. The company cannot withdraw from the field but must continue to function; that was one of the considerations for which it was permitted to enter the state.

Approaching the matter from a somewhat different angle, I am of the view that the particular field of taxation had already been preempted by the state under chapter 113, Laws of 1921, Rem. Comp. Stat., § 10417, chapter 107, Laws of 1923, Rem. 1927 Sup., § 10417, both amended by chapter 107, Laws of 1929, Rem. Rev. Stat., §§ 10417-10419; and chapter 227, Laws of 1929, § 5, Rem. Rev. Stat., § 3836-5. The amending act of 1929 requires every public

utility to file with the Department of Public Works an annual statement showing its gross operating revenues for the preceding year, and to pay a fee of one tenth of one per cent thereon. All such fees are required to be deposited in the public service revolving fund. The act makes the failure to pay such fees a misdeameanor punishable by a fine for each day's failure to pay. The last act requires all foreign corporations doing intrastate business in this state to pay certain fees for the privilege of doing such business. Those acts are, in my opinion, purely license acts and not regulatory. The funds derived therefrom are not devoted to the purpose of regulation, but, with the exception of the annual fees paid to the secretary of state, are required to be paid into the public service revolving fund, which is a general fund of the state subject to reappropriation by the legislature. The right to appropriate funds, under Art. VIII, § 4, of the state Constitution, is recognized in State ex rel. Bloedel-Donovan Lumber Mills v. Clausen, 122 Wash. 531; 211 Pac. 281, and State ex rel. Shuff v. Clausen, 131 Wash. 119, 229 Pac. 5. The state having occupied the field of excise taxation, the city may not encroach upon it. We have here the same situation, in principle, as was presented in State ex rel. Webster v. Superior Court, 67 Wash. 37 120 Pac. 861, where [fol. 71] the right of the state was declared supreme and exclusive. The state having granted the privilege and having taxed it, the city could not thereafter exact an additional sum for the same privilege or right; otherwise, the municipality, by added exactions, could thwart the whole purpose of the state in admitting corporation to do a specific business therein on such terms as it saw fit to fix. The sovereign would be subsidiary to its various subdivisions. Cincinnati v. American Telephone & Telegraph Co., 112 Ohio St., 493, 147 N. E. 806; Firestone v. City of Cambridge, 113 Ohio St., 57, 148 N. E. 470; Cincinnati Oil Works v. City of Cincinnati, 123 Ohio St. 448, 177 N. E. 768.

Further, I think that the definition of "Gross Income", in the ordinance, is so vague and uncertain as to render the ordinance inoperative and void. By its provisions the ordinance is penal. Fine and imprisonment are the penalties for non-compliance. The taxpayer is entitled to know definitely and certainly the amount of tax which he

is required to pay and the method of its ascertainment, without the expense of litigation necessary to determine either. Western Union Telegraph Co. v. Texas, 87 Tex. 630; State ex rel. Crow, Attorney General v. West Side Street Ry. Co., 146 Mo. 155, 47 S. W. 959; Standard Oil Co. v. State, 178 Ala. 400, 59 So. 667; Winslett v. Case Fowler Lumber Co., 173 Ga. 539, 160 S. E. 384.

Looking at the terms of the ordinance, I do not see how the taxpayer could possibly determine the amount of tax to be paid by it, or the method of its ascertainment, without resort to litigation. Different and vitally conflicting views will arise out of the interpretation of its language. Section 2 of the ordinance reads as follows, with reference to the definition of income:

"Gross Income: The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other [fol. 72] emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages or other evidences of indebtedness or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor, costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses."

Does the word "value" as there used import "cost price", "sale price", or "net profit" on the sale of tangible property or service? If any one of these was intended, it could easily have been expressed. Again, the word "receipts" expressly excludes receipts or proceeds from the use or sale of real property. Appellant's equipment to the extent of millions of dollars is housed in, and in large part is permanently affixed to, buildings which are a part of the realty. Are the receipts from that source, pro tanto, to be deducted? Who shall say? How is anyone to know? It may confidently be assumed that the city will insist that no deductions are to be made in that respect. As confidently may it be assumed that the appellant will insist to the contrary. Many other questions are raised by the wording of this section, all of which lead to confusion in

the atempt to interpret them. The majority opinion says that the definition of "Gross Income" in the present ordinance is substantially the same as that contained in the act of West Virginia, considered and sustained in the case of Hope Natural Gas Co. v. Hall, State Tax Commissioner, 274 U. S. 284. I do not so read it. That act provided that persons engaging in certain businesses should pay a tax "equal to the value of the articles produced as shown by the gross proceeds derived from the sale thereof by the producer (except as hereinafter provided) multiplied by the respective rates". The language is not only entirely different, but upon its very face it shows that the tax is to be computed on the gross sales of the products. No such certainty or definiteness appears here. The rule by which the tax is to be measured should be definite and certain, and its definiteness and certainty should appear from its provisions and not be the product of either litigation or [fol. 73] compromise.

For the reasons suggested, and rather briefly stated in the light of the extended discussion in the briefs, I dissent.

Steinert, J.

[fols. 74-87] Petition for rehearing, covering 14 pages, filed May 18, 1933, omitted from this print. It was denied and nothing more by order of June 14, 1933.

[fol. 88] In Supreme Court of Washington

[Title omitted]

Order Denying Rehearing—Filed June 14, 1933

The court having considered the appellant's petition for a rehearing herein,

It is ordered that the said petition be and it hereby is denied.

Dated this 14 day of June, 1933.

By the Court:

Walter B. Beals, Chief Justice.

[File endorsement omitted.]

[fol. 89] IN SUPREME COURT OF WASHINGTON

No. 24296

PUGET SOUND POWER & LIGHT COMPANY, Appellant,

vs.

THE CITY OF SEATTLE, Respondent

JUDGMENT—June 14, 1933

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of King County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 14th day of June, A. D. 1933, on motion of A. C. Van Soelen, C. V. Heard, W. L. Baumgartner, of counsel for respondent considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is, hereby affirmed with costs; and that the said The City of Seattle have and recover of and from the said Puget Sound Power & Light Co. and from New Amsterdam Casualty Co. surety the costs of this acton taxed and allowed at One Hundred & Twelve & 15/100 Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[fol. 90] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL, ASSIGNMENT OF ERRORS, AND PRAYER FOR REVERSAL—Filed June 19, 1933

Your petitioner, the appellant above named, to-wit, Puget Sound Power & Light Company, a Massachusetts corporation, hereby respectfully sets forth that on the 14th day of June, 1933 the Supreme Court of the State of Washington sitting at Olympia, Washington, made and entered a

final decision in the above entitled cause affirming a judgment of the Superior Court for King County, Washington, in favor of appellee and against your petitioner; that the Supreme Court of the State of Washington is the highest court of the said State of Washington in which a decision in said matter can be had.

Considering itself aggrieved by the said final decision of the said Supreme Court of the State of Washington in the above entitled cause, the plaintiff therein, Puget Sound Power & Light Company, hereby prays that an appeal be allowed to the Supreme Court of the United States, herein, and that said appeal shall operate as a supersedeas and shall suspend and stay the return of the remittitur in said cause from the Supreme Court of the State of Washington [fol. 91] to the Superior Court of the State of Washington for King County, and shall suspend and stay the enforcement of Ordinance No. 62662, of the City of Seattle, or any part thereof, against petitioner during the pendency of said appeal, and for an order fixing the amount of the bond thereon.

Assignment of Errors

The said Puget Sound Power & Light Company assigns the following errors in the record and proceedings in the said cause:

I

The Supreme Court of the State of Washington erred in holding that Ordinance No. 62,662 of the City of Seattle, under the facts of this case, does not deny to appellant the equal protection of the law and does not deprive appellant of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States, in that, in and by said ordinance, there is imposed upon appellant, for revenue purposes only, a license tax of 3% of appellant's gross revenues from its electric light and power business in the City of Seattle, and the same or a similar burden is not imposed upon appellant's competitor in said electric light and power business in said City of Seattle, namely, The City of Seattle, which is engaged in such business in a proprietary capacity (not governmental) and for profit.

II

The Supreme Court of the State of Washington erred in holding that even though appellee, the City of Seattle, in a proprietary capacity and for profit is engaged in direct and active competition with appellant in the light and power business in the City of Seattle, the City of Seattle may lawfully impose upon appellant a license tax solely [fol. 92] for revenue purposes in the amount of three per cent of appellant's gross revenue from its said light and power business, and may fail to impose a similar tax upon appellant's competitor in said business, the City of Seattle, and may exempt appellant's said competitor from such taxation; and in holding that for the purpose of such a tax imposed by the City of Seattle the said city may classify the corporations engaged in the electric light and power business in the city into two groups, namely, (1) municipally owned, and (2) privately owned, and may impose such an excise tax upon the privately owned corporation engaged in such business and may exempt from such tax or fail to impose the tax upon the municipally owned corporation which is engaged in the same identical business in a proprietary capacity and for profit. Such holdings of the Supreme Court of the State of Washington deny appellant equal protection of the law and deprive appellant of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

III

The Supreme Court of Washington erred in failing to hold that, under the facts of this case, the tax imposed upon appellant by Seattle Ordinance No. 62,662, constitutes an appropriation of appellant's property without compensation and will deprive appellant of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States, even though the City of Seattle could and did by said ordinance impose upon itself the same tax which by said ordinance it asserts the right to impose upon appellant.

IV

The Supreme Court of the State of Washington erred [fol. 93] in refusing to hold that in its application to appellant under the conceded facts said ordinance is repugnant to the Fourteenth Amendment to the Constitution of the United States because in its actual operation and effect the application thereof to appellant will constitute an oppressive and a confiscatory exercise of a governmental power of taxation by the City of Seattle in aid of its proprietary business, will enable the City of Seattle as witness, prosecutor, jury, judge and executioner (regardless of motive) to eliminate appellant as competitor of the City of Seattle and will result in a spoilation of appellant's business and property and an appropriation thereof by the City of Seattle without compensation.

V

The Supreme Court of the State of Washington erred in holding that said Ordinance No. 62,662, of the City of Seattle does not constitute an impairment of the franchise contract between appellant and the City of Seattle, in contravention of Article I, Section 10, of the Constitution of the United States.

VI

The Supreme Court of the State of Washington erred in refusing to hold that the ordinance is repugnant to the Fourteenth Amendment to the Constitution of the United States in that the ordinance, and particularly the definition of "gross income" in Section 2, thereof, is vague, indefinite and uncertain.

Prayer for Reversal

For which errors appellant prays that the said judgment of the Supreme Court of the State of Washington dated [fols. 94-104] June 14, 1933, be reversed and a judgment and decree entered in favor of plaintiff as prayed in its amended complaint, and for costs.

Elmer E. Todd, Clarence R. Innis, Frank E. Holman, William M. Allen, Counsel for Appellant.

[fol. 105] [File endorsement omitted]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed June 19, 1933

The appellant in the above entitled suit, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of the State of Washington on the 14th day of June, 1933, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided,

It is now here ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Washington in the above entitled cause as provided by law, and that upon the execution of a bond in the total penalty of Twenty-five thousand Dollars ($25,000), One thousand dollars ($1,000) of which amount is security for costs on appeal, said appeal [fol. 106] shall operate as a supersedeas and shall suspend and stay the return of the remittitur herein from the Supreme Court of the State of Washington to the Superior Court of King County, Washington, and the enforcement of Ordinance No. 62,662 of the City of Seattle or any part thereof against appellant until the final determination of said appeal, and

It is further ordered that the Clerk of the Supreme Court of the State of Washington shall prepare and certify a transcript of the record, proceedings and judgment in this cause, in accordance with Rule 10 of the Revised Rules of the Supreme Court of the United States, and transmit the same to the Supreme Court of the United States so that he shall have the same in said court within sixty (60) days of this date.

Dated this 19 day of June, 1933.

Walter B. Beals, Chief Justice of the Supreme Court of the State of Washington.

[fols. 107 & 108] Supersedeas bond on appeal for $25,000, approved and filed June 19, 1933, omitted in printing.

[fols. 109-111] Citation, in usual form, showing service on A. C. Van Soelen et al., filed June 21, 1933, omitted in printing.

[fol. 112] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

PRÆCIPE FOR RECORD ON APPEAL—Filed June 21, 1933

To the Honorable C. S. Reinhart, Clerk of the Supreme Court of the State of Washington:

You will please make and transmit to the Supreme Court of the United States, under your hand and seal of the Supreme Court of Washington, in the manner and in the time required by the statutes of the United States, the rules of the Supreme Court of the United States and the Order allowing an appeal in the above entitled cause, a true copy of the material parts of the record in the above entitled cause, including therein the following documents and papers, to-wit:

1. Amended Complaint, including (a) Ordinance No. 62662 attached thereto as Exhibit "A", and (b) Protest attached thereto as Exhibit "B".
2. Defendant's motion to strike from Amended Complaint.
3. Order on defendant's motion to strike from Amended Complaint.
4. Demurrer of Defendant to Amended Complaint.
5. Order sustaining demurrer to Amended Complaint.
6. Stipulation filed October 5, 1932.
7. Judgment and Decree of Dismissal and Notice of Appeal to Supreme Court of Washington.
8. Opinion of Supreme Court of Washington filed April 21, 1933.

[fol. 113] 9. Opinion of Supreme Court of Washington in its Case No. 24,327, The Pacific Telephone and Telegraph Company, a corporation, Appellant, v. The City of Seattle, et al., Respondents.

10. Appellant's Petition for Rehearing.

11. Order denying Petition for Rehearing dated June 14, 1933.

12. Judgment entered June 14, 1933.

13. Petition for allowance of appeal, assignments of error and prayer for reversal.

14. Statement as to jurisdiction of the Supreme Court of the United States.

15. Order allowing appeal and fixing bond.

16. Bond.

17. Citation with proof of service.

18. Notice directing attention to Rule 12, United States Supreme Court Rules.

19. Acknowledgment of service of copies of petition for appeal, order allowing appeal, assignments of error, statement as to the jurisdiction, and notice directing attention to Rule 12, United States Supreme Court Rules.

20. Præcipe for record and proof of service.

Elmer E. Todd, Clarence R. Innis, Frank E. Holman, William M. Allen, Counsel for Appellant.

Service of the foregoing Præcipe and receipt of copy thereof acknowledged this 20 day of June, 1933.

A. C. Van Soelen, Walter L. Baumgartner, Charles V. Hoard, Counsel for Appellee.

[fol. 114] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 115] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Aug. 14, 1933.

Comes now the appellant and adopts its assignments of error as its statement of the points to be relied upon and

represents that the whole of the record, as filed, is necessary for the consideration of the case.

Elmer E. Todd, Clarence R. Innis, Frank E. Holman, William M. Allen, Counsel for Appellant.

Service of the foregoing statement and designation acknowledged this 20 day of June, 1933.

A. C. Van Soelen, Walter L. Baumgartner, Charles V. Hoard, Counsel for Appellees.

[fol. 116] [File endorsement omitted.]

Endorsed on cover: File No. 37,947. Washington Supreme Court. Term No. 344. Puget Sound Power & Light Company, Appellant, vs. The City of Seattle. Filed August 14, 1933. File No. 344, O. T., 1933.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 344

PUGET SOUND POWER & LIGHT COMPANY, A CORPORATION, APPELLANT,

vs.

THE CITY OF SEATTLE, A MUNICIPAL CORPORATION, APPELLEE.

STATEMENT AS TO JURISDICTION.

The appellant, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

A.

Statutory Provision Sustaining Jurisdiction.

The Act of February 13, 1925, ch. 229, Section 1; 43 Stat. 937 (U. S. C., Title 28, Sec. 344) provides that Section 237 of the Judicial Code is amended to read in part as follows:

> "SECTION 237(*a*.) A final judgment or decree in any suit in the highest court of a state in which a decision in the suit can be had, * * * where is drawn in ques-

tion the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

B.

Statute of the State the Validity of Which is Involved.

The validity of a taxing ordinance of the City of Seattle, a municipal corporation, existing under and by virtue of the laws of the State of Washington is involved. The ordinance is numbered 62,662. The pertinent provisions thereof are:

"ORDINANCE No. 62662.

AN ORDINANCE relating to, and providing for, a license or occupation tax upon certain businesses, occupations, pursuits and privileges, defining offenses; and providing penalties.

Be it ordained by the City of Seattle as follows:

SECTION 1. *Exercise of Revenue License Power.*—The provisions of this ordinance shall be deemed an exercise of the power of the City of Seattle to license for revenue.

SECTION 2. *Definitions.*—In construing the provisions of this ordinance, save when otherwise plainly declared or clearly apparent from the context, the following definitions shall be applied:

Gross Income.—The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not), by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds

from the sale of notes, bonds, mortgages, or other evidences of indebtedness, or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses.

* * * * * * *

SECTION 3. *'Occupation License' Required.*—After the 1st day of July, 1932, no person shall engage in or carry on any business, occupation, pursuit or privilege for which a license fee or tax is imposed by this ordinance without having first obtained, and being the holder of, a valid and subsisting license so to do, to be known as an 'Occupation License.'

Any person engaging in, or carrying on, more than one such business, occupation, pursuit or privilege shall pay the license tax so imposed upon each of the same.

Any taxpayer who engages in, or carries on, any business subject to tax hereunder without having his 'Occupation License' so to do, shall be guilty of a violation of this ordinance for each day during which the business is so engaged in or carried on, and any taxpayer who fails or refuses to pay the license fee or tax or any part thereof on or before the due date shall be deemed to be operating without having his license so to do.

* * * * * * *

SECTION 5. *Occupation Subject to Tax—Amount.*—There are hereby levied and shall be collected annual license fees or occupation taxes against the persons on account of the business activities, and in the amounts to be determined by the application of the rates against gross income, as follows:

(*a*) * * *

(*b*) * * *

(*c*) Upon every person engaged in or carrying on the business of selling or furnishing electric light and power a fee or tax equal to three per cent (3%) of the

total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than Two Hundred Fifty ($250.00) Dollars per tax year.

. . . . . .

SECTION 6. *City of Seattle Subject to Tax.*—Subdivisions (*b*) and (*c*) of Section 5 shall, so far as permitted by law, be applicable to the City of Seattle, except that said City shall not, as a taxpayer, be required to conform to the other provisions of this ordinance.

. . . . . .

SECTION 15. *Taxpayer to Keep Books and Records. Returns Confidential.*—It shall be the duty of each taxpayer taxed upon his gross income to keep and enter in a proper book or set of books or records an account which shall accurately reflect the amount of his gross income, which account shall always be open to the inspection of the City Comptroller, or his duly authorized agent, and from which said officer or his agent may verify the return made by the taxpayer.

The applications, statements or returns made to the City Comptroller, pursuant to this ordinance, shall not be made public, nor shall they be subject to the inspection of any person except the Mayor, the Corporation Counsel, the City Comptroller, or his authorized agent, and members of the City Council.

SECTION 16. *Comptroller to Investigate Returns.*—If any taxpayer fails to apply for license or make his return, or if the City Comptroller is dissatisfied as to the correctness of the statements made in the application or return of any taxpayer, said officer, or his authorized agent, may enter the premises of such taxpayer at any reasonable time for the purpose of inspecting his books or records of account to ascertain the amount of the fee or tax or to determine the correctness of such

statements, as the case may be, and may examine any person under oath administered by said officer, or his agent, touching the matters inquired into, or said officer, or his authorized agent, may fix a time and place for an investigation of the correctness of the return and may issue a subpoena to the taxpayer, or any other person, to attend upon such investigation and there testify, under oath administered by said officer, or his agent, in regard to the matters inquired into and may, by subpoena, require him, or any person, to bring with him such books, records and papers as may be necessary.

* * * * * * *

SECTION 24. *Penalty.*—Any person violating or failing to comply with any of the provisions of this ordinance or any lawful rule or regulation adopted by the City Comptroller pursuant thereto, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine in any sum not to exceed Three Hundred ($300.00) Dollars, or by imprisonment in the City Jail for a term not exceeding ninety (90) days, or by both such fine and imprisonment."

C.

The date of the judgment sought to be reviewed is June 14, 1933.

The petition for allowance of an appeal is presented on the 19th day of June, 1933.

D.

Nature of Case and Ruling Below.

Plaintiff, Puget Sound Power & Light Company, brought the action in the Superior Court of King County, Washington, to (1) enjoin defendant, the City of Seattle, from collecting from plaintiff the license tax prescribed by Ordinance No. 62,662, and to restrain any attempt by the city

to enforce the ordinance and its penalties against plaintiff; and (2) to recover from defendant the sum of $9,697.75 with interest from July 1, 1932, which amount, under protest, plaintiff had paid to defendant as the first monthly installment of the ordinance tax.

Inter alia the following facts were alleged in the amended complaint:

Plaintiff is a public utility corporation organized under the laws of the State of Massachusetts and as such since 1912 has been and is engaged in the electric light and power business in the State of Washington, including the City of Seattle, Washington (paragraph I).

Plaintiff has a license from the State of Washington authorizing it to engage in said business in the entire State of Washington (paragraph XVII).

Plaintiff is lawful owner and holder of an operating franchise granted by defendant, the City of Seattle, which does not expire until March 14, 1952. By said franchise plaintiff is granted the right to construct, maintain and operate in the City of Seattle equipment and apparatus for the distribution of electric light, heat and power (paragraph VII).

Defendant, the City of Seattle, is a municipal corporation organized and existing under and by virtue of the laws of the State of Washington. In a proprietary capacity and for profit defendant has been for many years and now is engaged in the business of selling and furnishing electric light and power to the public for hire within the corporate limits of the City of Seattle, and has been and is engaged in direct and active competition with plaintiff in such business (paragraph II).

The defendant, the City of Seattle, has sole and exclusive power to fix and determine the rates at which it sells electric light and power to its customers and is not in any

respect regulated by the State of Washington or its Department of Public Works (paragraph III).

The rates charged by plaintiff for the electric light and power which it sells to its customers are subject to the exclusive control and regulation of the Department of Public Works of the State of Washington. Defendant, the City of Seattle, under the laws of the State of Washington, has no power of supervision, control or regulation of plaintiff's rates, rules, regulations and practices (paragraph IV).

The property of defendant used by it in its proprietary electric light and power utility business is exempt from city, county and state property taxes (paragraph III).

Plaintiff is required to pay annual taxes for state, county and city purposes upon all of its property (including its franchise granted by defendant) used in its business in the amount of many thousands of dollars (paragraph IV).

All persons in the City of Seattle who desire to purchase electrical energy for light and power purposes may purchase same only from the City of Seattle or plaintiff. Defendant is actively engaged in soliciting customers in the City of Seattle to whom it may sell electric light and power, and is actively soliciting customers of plaintiff to cease purchasing electric light and power from plaintiff and to make purchases from the city. In order to retain its customers plaintiff is obliged to sell its electrical energy used for light and power purposes at rates no higher than the rates fixed and determined by the city as the rate to be charged the city's customers (paragraph V).

Plaintiff cannot secure relief from a confiscatory excise tax imposed upon it by the City of Seattle through application to the Department of Public Works of the State of Washington for authority to increase its rates. If plaintiff were authorized to charge rates higher than the rates

charged by the city, and did so, plaintiff would lose all of its customers. The City of Seattle has not increased its rates for electric light and power since the enactment of its ordinance No. 62,662 (paragraph XX).

The City of Seattle annually for hire in its proprietary capacity sells to itself in its governmental capacity all of the electric light and power used by it for lighting the public streets and other municipal purposes at rates fixed and determined by the city, regardless of the market value of same and regardless of the price at which same could be secured in the open market. For such electric light and power the city in its governmental capacity annually pays itself out of the moneys in the general fund of the city, which general fund is supported by property taxes collected by the city. The amount of such payments is in excess of $438,000 annually (paragraph VI).

The City of Seattle has financed its proprietary electric light and power business by the sale of revenue bonds in amounts in excess of thirty million dollars. The principal and interest of said bonds are payable only out of the gross revenues of the city's light and power business. Such bonds are by the law of the State of Washington and by the express terms of each of said bonds prior liens upon the city's entire gross revenue from its light and power business—taking precedence even over operating charges (paragraph IX).

After alleging the enactment of Seattle Ordinance No. 62,662 (paragraph XII) and the payment by plaintiff under protest of the first monthly installment that would be due thereunder if said ordinance were valid and enforceable as to plaintiff, the amount of said monthly payment being $9,697.75, it is alleged that by said ordinance defendant is not required to pay the license fee or tax therein specified out of revenues received by defendant from its

proprietary business of selling electric light and power, or at all, and that the ordinance is in no respect enforceable against defendant (paragraph XIV) and does not impose any such tax upon appellant's competitor, namely, the City of Seattle.

The validity of the ordinance in its application to plaintiff was challenged *inter alia* upon the following grounds:

Plaintiff charged that under the facts alleged, in its application to plaintiff, the ordinance (1) would be repugnant to the Fourteenth Amendment to the Constitution of the United States in that the enforcement thereof against plaintiff would deny plaintiff equal protection of the law and deprive plaintiff of its property without due process of law; and (2) would be repugnant to Article I, Section 10, of the Constitution of the United States, in that such application to plaintiff would impair the obligation of the operative franchise contract between plaintiff and defendant; and (3) would constitute an oppressive and confiscatory exercise by defendant of a governmental power of taxation in aid of its proprietary business of selling electric light and power for profit; and (4) would constitute an appropriation and would result in a spoliation of plaintiff's property without compensation; and (5) would constitute unlawful and oppressive discrimination in that the ordinance tax would be exacted of plaintiff but would not be exacted of plaintiff's competitor, the City of Seattle, which is engaged in the same identical business in a proprietary capacity for profit.

The validity of the ordinance was also challenged as repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States because Section 2 of the ordinance, and particularly the definition of "gross income" therein, is vague, indefinite and uncertain with respect to the amount of the tax to be paid

and the method by which the amount may be ascertained to an extent that men of "common intelligence must necessarily guess at its meaning and differ as to its application."

Defendant demurred to plaintiff's amended complaint. The trial court sustained the demurrer and entered a judgment dismissing plaintiff's action. Upon appeal by plaintiff to the Supreme Court of Washington, which is the highest court in the State of Washington in which a decision in the suit could be had, the validity of the ordinance was by said court sustained and the judgment entered by the trial court was affirmed.

E.

Cases Believed to Sustain Jurisdiction.

The following decisions of the Supreme Court of the United States are believed to sustain jurisdiction of this appeal, to-wit:

1. A municipal ordinance is a statute within the operation of the Act of February 13, 1925, Ch. 229, Section 1; 43 Stat. 937 (U. S. C., Title 28, Sec. 344).

King v. *Augusta*, 277 U. S. 100.

2. As to denial of equal protection of the law and deprivation of property without due process of law:

Educational Films Corp. v. *Ward*, 282 U. S. 379.

Quaker City Cab Co. v. *Pennsylvania*, 277 U. S. 390, 402.

Texas Electric Service Co. v. *City of Seymour*, 54 Fed. (2d) 97.

Los Angeles Gas and Electric Co. v. *City of Los Angeles*, 241 Fed. 912. (Affirmed 251 U. S. 32.)

Frost v. *Corporation Commissioner*, 278 U. S. 515, 522.

Atchison, etc., Railroad Co. v. *Matthews*, 174 U. S. 96.

3. As to impairment of obligation of franchise granted to plaintiff by defendant:

Los Angeles v. *Los Angeles Gas & Elec. Corp.*, 251 U. S. 32.

4. As to the vagueness and uncertainty of the definition of "gross income":

Connolly v. *General Construction Co.*, 269 U. S. 385.

Champlin Refining Co. v. *Commission*, 286 U. S. 210, 243.

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 237 of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 344).

Respectfully submitted,

ELMER E. TODD,
CLARENCE R. INNIS,
FRANK E. HOLMAN,
WILLIAM M. ALLEN,
Counsel for Appellant.

No. 344

Supreme Court of the United States

October Term—1933

PUGET SOUND POWER & LIGHT COMPANY, a corporation,

Appellant,

vs.

THE CITY OF SEATTLE, a municipal corporation,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

Brief of Appellant

ELMER E. TODD,
FRANK E. HOLMAN,
WILLIAM M. ALLEN,
CLARENCE R. INNIS,
Counsel for Appellant.

1006 Hoge Building,
Seattle, Washington.

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No. 344

Supreme Court of the United States

October Term—1933

PUGET SOUND POWER & LIGHT COMPANY, a corporation,

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vs.

THE CITY OF SEATTLE, a municipal corporation,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

Brief of Appellant

I.

OPINION OF THE COURT BELOW.

The final opinion of the Supreme Court of the State of Washington in this case is reported in *Puget Sound Power & Light Company, a corpora-*

tion, appellant, vs. The City of Seattle, a municipal corporation, respondent (72 Wash. Dec. 519). The opinion is printed in the record (R. 38). Appellant's petition for rehearing was denied June 14, 1933 (R. 62).

The letter "R" wherever used in this brief indicates a reference to the printed transcript of the record.

II.

JURISDICTION

The appellant refers to the Statement as to Jurisdiction, which is a part of the record and printed separately.

III.

ORDINANCE OF THE CITY OF SEATTLE INVOLVED IN THIS APPEAL

The validity of Ordinance No. 62,662 of the City of Seattle, Washington, a municipal corporation, is involved in this case (R. 18). The pertinent provisions thereof are as follows:

"ORDINANCE NO. 62662

AN ORDINANCE relating to, and providing for, a license or occupation tax upon certain businesses, occupations, pursuits and privileges; defining offenses and providing penalties.

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. EXERCISE OF REVENUE LICENSE POWER: The provisions of this ordinance shall be deemed an exercise of the power of the City of Seattle to license for revenue.

Section 2. DEFINITIONS: In construing the provisions of this ordinance, save when otherwise plainly declared or clearly apparent from the context, the following definitions shall be applied:

GROSS INCOME: The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness, or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses.

. . . . . .

Section 3. 'OCCUPATION LICENSE' REQUIRED: After the 1st day of July, 1932, no person shall engage in or carry on any business, occupation, pursuit or privilege for which a license fee or tax is imposed by this ordinance without having first obtained, and being the holder of, a valid and subsisting license so to do, to be known as an 'Occupation License.'

Any person engaging in, or carrying on, more than one such business, occupation, pursuit or privilege shall pay the license tax so imposed upon each of the same.

Any taxpayer who engages in or carries on, any business subject to tax hereunder without having his 'Occupation License' so to do, shall be guilty of a violation of this ordinance for each day during which the business is so engaged in or carried on, and any taxpayer who fails or refuses to pay the license fee or tax or any part thereof on or before the due date shall be deemed to be operating without having his license so to do.

Section 5: OCCUPATIONS SUBJECT TO TAX—AMOUNT: There are hereby levied and shall be collected annual license fees or occupation taxes against the persons on account of the business activities, and in the amounts to be determined by

the application of the rates against gross income, as follows:

(a) . . . . . .

(b) . . . . . .

(c) Upon every person engaged in or carrying on the business of selling or furnishing electric light and power a fee or tax equal to three per cent. (3%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than Two Hundred Fifty ($250.00) Dollars per tax year.

. . . . . .

Section 6. CITY OF SEATTLE SUBJECT TO TAX: Subdivisions (b) and (c) of Section 5 shall, so far as permitted by law, be applicable to the City of Seattle, except that said City shall not, as a tax payer, be required to conform to the other provisions of this ordinance.

. . . . . .

Section 15. TAXPAYER TO KEEP BOOKS AND RECORDS—RETURNS CONFIDENTIAL: It shall be the duty of each taxpayer taxed upon his gross income to keep and enter in a proper book or set of books

or records an account which shall accurately reflect the amount of his gross income, which account shall always be open to the inspection of the City Comptroller, or his duly authorized agent, and from which said officer or his agent may verify the return made by the taxpayer.

The applications, statements or returns made to the City Comptroller, pursuant to this ordinance, shall not be made public, nor shall they be subject to the inspection of any person except the Mayor, the Corporation Counsel, the City Comptroller, or his authorized agent, and members of the City Council.

Section 16: COMPTROLLER TO INVESTIGATE RETURNS: If any taxpayer fails to apply for license or make his return, or if, the City Comptroller is dissatisfied as to the correctness of the statements made in the application or return of any taxpayer, said officer, or his authorized agent, may enter the premises of such taxpayer at any reasonable time for the purpose of inspecting his books or records of account to ascertain the amount of the fee or tax or to determine the correctness of such statements, as the case may be, and may examine any person under oath administered by said officer, or his agent, touching the matters inquired into, or

said officer, or his authorized agent, may fix a time and place for an investigation of the correctness of the return and may issue a subpoena to the taxpayer, or any other person, to attend upon such investigation and there testify, under oath administered by said officer, or his agent, in regard to the matters inquired into and may, by subpoena, require him, or any person, to bring with him such books, records and papers as may be necessary.

. . . . . .

Section 24. PENALTY: Any person violating or failing to comply with any of the provisions of this ordinance or any lawful rule or regulation adopted by the City Comptroller pursuant thereto, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine in any sum not to exceed Three Hundred ($300.00) Dollars, or by imprisonment in the City Jail for a term not exceeding ninety (90) days, or by both such fine and imprisonment."

IV.

STATEMENT OF THE CASE

Appellant is a privately owned public utility corporation engaged in the business of generating, distributing and selling electric light and power

in the City of Seattle, Washington. Appellee is a municipal corporation organized under the laws of the State of Washington. It will be referred to herein as appellee and/or "the city".

By its foregoing ordinance No. 62,662 effective from July 1, 1932, for revenue purposes only, the city asserted the right to impose upon appellant an annual license tax in the amount of three per cent of appellant's total gross income from its electric light and power business in said city.

To reduce to a minimum the risk of the drastic penalties of said ordinance and to enable appellant to lawfully contest the constitutional validity thereof as enacted and the validity thereof in its application to appellant, under written protest, appellant attempted to make a valid return of its gross income in conformity with the requirements of the ordinance. In its protest appellant asserted that it was unable to determine with any degree of certainty the meaning of "gross income" as defined by the ordinance or the manner by which gross income as thus defined could be ascertained (R. 8, 27).

Under the return made by appellant, if the ordinance were valid and enforcible against it, and if appellant had correctly guessed at the meaning

of the term "gross income" as defined by the ordinance, there would have been due to the city from appellant for such license tax for the twelve months period ending June 30, 1933, the sum of $116,363 payable in twelve monthly installments of $9,697.75 each. Under written protest appellant paid the first monthly installment of $9,697.75 and thereupon promptly filed the instant suit, alleging (in its amended complaint) two causes of action (R. 1).

By its first cause of action appellant sought recovery of the sum of $9,696.75, which under protest it had paid as the first monthly installment of the tax. By its second cause of action appellant sought to restrain any attempt by the city to enforce said ordinance or any part thereof against appellant.

The issues were determined in the trial court upon a demurrer of the city to appellant's amended complaint (R. 34). The facts alleged in the amended complaint will be subsequently stated. The trial court sustained the city's demurrer and entered a judgment dismissing appellant's causes of action. From this judgment of dismissal appellant appealed to the Supreme Court of the State of Washington.

A majority of the Supreme Court of the State of Washington in an opinion filed April 21, 1933,

affirmed the judgment of dismissal entered by the trial court (R. 38). Appellant thereupon filed its petition for a rehearing, which on June 14, 1933, was denied (R. 62). On said date judgment of affirmance was entered in the Supreme Court of the State of Washington. On June 19, 1933, the appeal herein was allowed (R. 67).

In its amended complaint appellant alleged, the city by its demurrer admitted, and the Supreme Court of the State of Washington in its opinion recognized the following facts:

Appellant Is Engaged in the Light and Power Business

Appellant, Puget Sound Power & Light Company, is a privately owned Massachusetts corporation which is qualified to do business in the State of Washington, including the City of Seattle. For many years appellant, as a public utility corporation, has been and now is actively engaged in the business of selling and furnishing electric light and power, within the definition thereof contained in the foregoing ordinance No. 62,662 of the City of Seattle (R. 1).

Appellant is the lawful owner and holder of a franchise known as the "Shuffleton Franchise"

which was granted by the city under its ordinance No. 7894 dated March 12, 1902. By said franchise for a period of fifty years expiring March 14, 1952, appellant was granted:

> "the right, authority and franchise, on the conditions and for the considerations in this ordinance expressed, to construct, maintain and *operate* equipment and apparatus for an underground electric system, and to erect and maintain poles, wires and appurtenances for the distribution of electric light, heat and power in, over and under the streets, alleys and public places of the City of Seattle. This right, authority and franchise is intended to apply to all streets, alleys and public places of said city, now or hereafter existing, subject to the terms and conditions hereinafter expressed; and said grantee, his successors and assigns, by accepting this ordinance covenant that within three years from the approval of this ordinance, he or they will have *in operation* a system extending to all streets and parts of streets now lighted by electricity; . . ."

By the terms of said franchise it is provided that same is subject to repeal or modification only "if the franchise granted hereby is not *operated* in accordance with the provisions of this ordinance or at all" (R. 3, 4).

The grantee accepted said franchise on March 27, 1902, and strictly in compliance with its terms and conditions, appellant and/or its predecessor in

interest constructed and acquired power plants and extensive distribution facilities for the purpose of selling and furnishing electrical energy for light and power purposes to the public. Continuously since the grant of said franchise appellant has maintained and operated and is now maintaining and operating said plants and facilities under said franchise for such purposes (R. 4).

As a privately owned public utility corporation appellant is required by the laws of the State of Washington to pay city, county and state property taxes upon all of its property in the City of Seattle, including its franchise granted by the city (R. 2).

Being a privately owned public utility corporation, as to its rates, rules, regulations and earnings, appellant is subject to the sole and exclusive regulation of the State of Washington (Remington's Revised Statutes of Washington, § 10362), which exercises such jurisdiction through the Department of Public Works of the State of Washington. The city does not have power to regulate appellant's business in the City of Seattle or to fix the rates to be charged for the electrical energy sold by appellant in the city. Under the laws of the State of Washington the city has no authority to permit or

to require appellant to cease doing business in the City of Seattle (R. 2).

The City Is Engaged in the Light and Power Business.

The city, as a municipal corporation, in a proprietary capacity and for profit, is also engaged in the business of selling and furnishing electric light and power in the City of Seattle within the definition thereof contained in its Ordinance No. 62,662. In such business the city is in direct and active competition with appellant (R. 2).

The city's venture in said proprietary business began in the year 1902 when by ordinance it authorized the issuance and sale of general lien bonds in the amount of $590,000 for the purpose of constructing or purchasing a plant or system for furnishing light and power to the public. Thereafter, from time to time other similar general lien bonds to finance the expansion of its electric light and power business were issued and sold by the city. The principal amount of all of such general lien bonds which were outstanding and unpaid on December 31, 1931, was approximately $1,447,000. Such general lien bonds are payable out of the city's tax supported funds (R. 5).

The major development of its extensive commercial light and power business, however, was financed through the issuance and sale by the city of revenue bonds which are obligations against only the gross revenues received by it from the sale of electric light and power to the public for hire. Such gross revenues of the city are by the laws of the State of Washington (Remington's Revised Statutes of Washington, 9491), the ordinances of the City of Seattle authorizing same, and by the expressed terms and conditions of each of said bonds, pledged to the payment of the principal thereof and any interest due thereon. Such pledge constitutes a charge upon such gross revenues "prior and superior to all other charges whatsoever, including charges for maintenance and operation" (R. 5, 6).

The first issue of such revenue bonds of the city was sold to the public in the year 1917. The total amount of such bonds sold since 1917 and the total amount that has been paid by the city out of the gross revenues received by it from its proprietary light and power business, for interest and to apply upon the principal of such bonds, are not shown by the record. It is alleged and conceded that at the time the instant suit was initiated the total principal amount of such outstanding and unpaid

revenue bonds was $32,852,000. The profits of the city from its proprietary electric light and power business are the sole source of the funds available for payment of the principal of these revenue bonds and any interest due thereon (R. 6).

Being a municipal corporation, under the laws of the State of Washington the city does not pay any city, county or state property taxes upon any of the property owned by it, whether same is used in its governmental capacity or in its proprietary business of selling electrical energy for profit (R. 2).

Being a municipal corporation, under the laws of the State of Washington, the city is not subject to regulation of any kind or character by the State of Washington or its Department of Public Works. The city has sole and exclusive power to fix and determine the rates at which it sells electric light and power to its customers, which power, under the charter of the city, is vested solely in its City Council (R. 2).

The city in its proprietary capacity annually sells to itself in its governmental capacity all of the electric light and power used for lighting the public streets of the City of Seattle and for other municipal and governmental purposes. The rates which

the city charges itself for such service are arbitrarily fixed and determined by its City Council without regard to the price at which such service could be purchased in the open market. To pay itself for such electrical energy the city transfers money from its General Fund (which is tax supported) to its City Light Fund, which is the fund of the city into which is paid all of its gross revenues from its proprietary light and power business. The amount of such payments is now in excess of $138,000 annually (R. 3).

Under the laws of the State of Washington the city may appropriate appellant's property by condemnation. As a condition precedent to such an appropriation the city is required to pay appellant the fair market value of the property appropriated (Remington's Revised Statutes 8966 (6), 9215, 9488).

The Competition Between Appellant and the City is Direct and Active

The competition between appellant and the city is as direct and active as it is possible for any competition in the same business to be. In the City of Seattle purchasers desiring electric light and power may receive same only from appellant or

the city. The city is actively seeking new customers and is continuously engaged in the solicitation of customers of appellant in an effort to persuade them to become customers of the city. The city actively exercises every coercive power at its command to increase the number of its customers to a maximum and to reduce the number of appellant's customers to a minimum (R. 2, 3).

The same rates are charged by the two competing utilities. If appellant charged a higher rate than is charged by the city, appellant would lose all of its customers. If the rates fixed and determined by the city do not permit appellant to earn a reasonable return or even any return upon the value of its property which is dedicated to the public use in the City of Seattle, appellant has no remedy. Application to the Department of Public Works of the State of Washington for authority to charge a higher rate could bring no relief to appellant. While that department may authorize appellant to increase its rates, it may not require the city to do so. The city, by reason of its competition in such business, in which it is engaged in a proprietary capacity and for profit, in fact definitely and permanently controls both the gross and the net income of appellant (R. 2, 3). ——

The city has not increased its rates since July 1, 1932, the effective date of its said ordinance No. 62,662 (R. 10).

In Fact and in Law the City is Not Subjected to the Tax Prescribed in Its Ordinance No. 62,662.

Even though section 6 of the ordinance provides that subdivision 5 (c) thereof (which imposes the tax upon appellant) shall "so far as permitted by law be applicable to the City of Seattle," the truth is that both in fact and in law the ordinance tax is not imposed upon the city. Although for profit and in a proprietary capacity the city is engaged in the light and power business in the City of Seattle in all respects the same as appellant is engaged in said business, the burden of the ordinance tax is imposed only upon appellant. In fact and in law appellant's competitor is not subjected to said excise tax imposition (R. 8, 9).

In this appeal there is no issue as to the foregoing facts. They are admitted by the demurrer. They are recognized by the opinion of the Supreme Court of Washington (R. 38).

V.

QUESTIONS PRESENTED TO THE SUPREME COURT OF WASHINGTON AND ITS DECISION THEREON

On many of the questions presented to the Supreme Court of Washington its decision is not subject to review. Those questions which were presented and which are subject to review by this court and which will be considered in this brief may be stated as follows:

1. Whether appellant is denied equal protection of the law and deprived of its property without due process of law in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that by the city's ordinance No. 62,662 there is imposed upon appellant for revenue purposes only a license tax of three per cent of appellant's gross income from its light and power business in the City of Seattle, and the same or a similar burden is not imposed upon appellant's competitor, namely, the City of Seattle, which is engaged in the same business in a proprietary capacity (not governmental) for profit.

The Supreme Court of Washington answered this question in the negative.

2. Whether under the facts in this case the City of Seattle, may, without contravention of the due process and equal protection clauses of Section 1 of the Fourteenth Amendment to the Constitution of the United States classify corporations engaged in the light and power business for profit in the City of Seattle into two groups, namely, (1) municipally owned, and (2) privately owned, and impose a license tax solely for revenue purposes in an amount of three per cent of its gross income upon the privately owned public utility corporation and exempt from tax, or fail to impose such a tax upon the competing municipally owned utility corporation.

The Supreme Court of Washington answered this question in the affirmative.

3. Whether, under the facts of this case, the tax imposed upon appellant by ordinance No. 62,662 constitutes an appropriation of appellant's property without compensation and will deprive appellant of its property without due process of law and will deny appellant equal protection of the law, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, even though the city could and did by said

ordinance impose upon itself the same tax which it asserts the right to impose upon appellant.

The Supreme Court of the State of Washington answered this question in the negative.

4. Whether under the facts of this case in its application to appellant, Seattle ordinance No. 62,662 is repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States because in its actual operation and effect the application thereof to appellant will inherently constitute an oppressive and confiscatory exercise by the city of a governmental power of taxation in aid of the city's proprietary business, and will result in a spoliation of appellant's business and property and an appropriation thereof by the city without compensation.

The Supreme Court of Washington answered this question in the negative.

5. Whether under the facts of this case, Seattle Ordinance No. 62,662 constitutes an impairment of the franchise contract between appellant and the city, in contravention of Article I, Section 10, of the Constitution of the United States.

The Supreme Court of the State of Washington answered this question in the negative.

6. Whether Seattle Ordinance No. 62,662 is repugnant to due process clause in Section 1 of the Fourteenth Amendment to the Constitution of the United States in that the ordinance is vague, indefinite and uncertain, particularly as to the definition of "gross income" in Section 2 thereof, with respect to the amount of the tax to be paid and the method by which the amount may be ascertained.

The Supreme Court of Washington answered this question in the negative.

Mr. Justice Steinert of the Supreme Court of Washington filed a dissenting opinion (R. 45).

VI.

SPECIFICATION OF ERRORS

The errors assigned in the record (R. 61) which appellant intends to urge and upon which appellant relies for reversal of the judgment of the Supreme Court of the State of Washington dated June 14, 1933, are:

I.

The Supreme Court of the State of Washington erred in holding that Ordinance No. 62,662 of the City of Seattle, under the facts of this case, does

not deny to appellant the equal protection of the law and does not deprive appellant of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States, in that, in and by said ordinance, there is imposed upon appellant, for revenue purposes only, a license tax of three per cent of appellant's gross revenues from its electric light and power business in the City of Seattle, and the same or a similar burden is not imposed upon appellant's competitor in said electric light and power business in said City of Seattle, namely, The City of Seattle, which is engaged in such business in a proprietary capacity (not governmental) and for profit.

II.

The Supreme Court of the State of Washington erred in holding that even though appellee, the City of Seattle, in a proprietary capacity and for profit is engaged in direct and active competition with appellant in the light and power business in the City of Seattle, the City of Seattle may lawfully impose upon appellant a license tax solely for revenue purposes in the amount of three per cent of appellant's gross revenue from its said light and power business, and may fail to impose a similar

tax upon appellant's competitor in said business, the City of Seattle, and may exempt appellant's said competitor from such taxation; and in holding that for the purpose of such a tax imposed by the City of Seattle the said city may classify the corporations engaged in the electric light and power business in the city into two groups, namely, (1) municipally owned, and (2) privately owned, and may impose such an excise tax upon the privately owned corporation engaged in such business and may exempt from such tax or fail to impose the tax upon the municipal corporation which is engaged in the same identical business in a proprietary capacity and for profit. Such holdings of the Supreme Court of the State of Washington deny appellant equal protection of the law and deprive appellant of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

III.

The Supreme Court of Washington erred in failing to hold that, under the facts of this case, the tax imposed upon appellant by Seattle Ordinance No. 62,662, constitutes an appropriation of appellant's property without compensation and will de-

prive appellant of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States, even though the City of Seattle could and did by said ordinance impose upon itself the same tax which by said ordinance it asserts the right to impose upon appellant.

IV.

The Supreme Court of the State of Washington erred in refusing to hold that in its application to appellant under the conceded facts said ordinance is repugnant to the Fourteenth Amendment to the Constitution of the United States because in its actual operation and effect the application thereof to appellant will constitute an oppressive and confiscatory exercise of a governmental power of taxation by the City of Seattle in aid of its proprietary business, will enable the City of Seattle as witness, prosecutor, jury, judge and executioner (regardless of motive) to eliminate appellant as competitor of the City of Seattle and will result in a spoliation of appellant's business and property and an appropriation thereof by the City of Seattle without compensation.

V.

The Supreme Court of the State of Washington erred in holding that said Ordinance No. 62662 of the City of Seattle does not constitute an impairment of the franchise contract between appellant and the City of Seattle, in contravention of Article I, Section 10, of the Constitution of the United States.

VI.

The Supreme Court of the State of Washington erred in refusing to hold that the ordinance is repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States in that the ordinance, and particularly the definition of the "gross income" in Section 2 thereof, is vague, indefinite and uncertain.

VII.

SUMMARY OF ARGUMENT

First: Under the novel facts of this case and the established controlling legal principles, Seattle Ordinance No. 62,622, in its application to appellant, is repugnant to the equal protection clause in Section 1 of the Fourteenth Amendment to the

Constitution of the United States, in that by said ordinance a license tax for revenue purposes only, in the amount of three per cent of appellant's gross income from its light and power business in the City of Seattle, is imposed upon appellant, a privately owned public utility corporation, and the same or a similar tax in fact and in law is not imposed upon appellant's competitor in said light and power business in the City of Seattle, namely, the City of Seattle, a municipal corporation, which is engaged in such business in a proprietary capacity and for profit. Such a classification is essentially arbitrary, capricious, unreasonable, unreal, and discriminatory.

The case of *South Carolina Power Co. vs. South Carolina Tax Commission*, 52 Fed. (2d) 515, relied upon by the Supreme Court of Washington, does not sustain the validity of the ordinance.

Second: Under the novel facts of this case, the imposition upon appellant of the tax prescribed by Seattle Ordinance No. 62,662 inherently will constitute an appropriation of appellant's property without compensation, will deprive appellant of its property without due process of law, and will deny appellant equal protection of the law, in contravention

of Section 1 of the Fourteenth Amendment to the Constitution of the United States, even though the city imposed the same tax upon itself.

The imposition of the tax upon appellant inherently constitutes a denial of equal protection of the law, regardless of payment or nonpayment thereof by the city. Any payment by the city to itself would be only an idle gesture and under the novel facts of this case could and would not be a payment in fact.

The imposition of the tax upon appellant inherently constitutes a denial of due process of law, regardless of payment or nonpayment thereof by the city. The reasons follow:

The city may not directly support and subsidize its proprietary light and power business by imposing a tax upon appellant, its privately owned competitor.

The validity of a taxing ordinance is to be determined by the practical results which follow its operation.

Under the novel facts of this case the practical and actual result which inherently follows the operation of the ordinance in its application to appellant is that the city will annually exact $120,000.00

or more of appellant in aid and subsidy of the city's proprietary light and power business in all respects the same as though said tax were imposed specifically for such purpose. The actual and practical results of the application of the ordinance to appellant will be (1) the elimination of appellant as a competitor of the city and a confiscation of appellant's business by the city; (2) an unlawful and oppressive governmental invasion by the city of the privacy of appellant's business to the direct aid of appellant's competitor and to the destruction of appellant; and (3) an unlawful depreciation of the value of appellant's property and a spoliation thereof, and *pro tanto*, a confiscation and an appropriation thereof without compensation. Under the novel facts of this case, the vices complained of are inherent in any assertion by the city of a power to tax its competitor regardless of the city's actual or asserted motive.

The Supreme Court of Washington is in error in its statement: "The question is: Can the State's power of taxation be abridged or abrogated by estoppel?"

The city may not lawfully be witness, prosecutor, judge, jury and executioner in the elimina-

tion of its competitor and in the appropriation of its competitor's property.

Third: Seattle Ordinance No. 62,662 requires appellant, as a condition precedent to the lawful continuance of its business in the City of Seattle, to secure and pay for a license. This requirement constitutes an impairment of the operative franchise contract between appellant and the city, in contravention of Article I, Section 10, of the Constitution of the United States.

Under penalty of fine and imprisonment, the ordinance prohibits the continuance of appellant's business in the City of Seattle unless appellant secures and pays for a license.

Appellant's franchise is a license from the city to engage in and to continue its light and power business in the City of Seattle until March 14, 1952. By said franchise appellant is charged with the duty of continuously operating said business.

The ordinance impairs the obligation of the franchise contract in that by the ordinance it becomes unlawful for appellant to exercise the privilege granted by the franchise contract unless appellant complies with the added burdens imposed by the ordinance.

Fourth: Seattle Ordinance No. 62,662 is repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States in that the definition of gross income in Section 2 thereof is vague, indefinite and uncertain.

The ordinance definition of gross income is so vague, indefinite and uncertain that the taxpayer must guess at its meaning. The penalty for a wrong guess is a heavy fine and imprisonment.

A taxing ordinance in terms so vague that men of common intelligence must guess at its meaning and differ as to its application violates the first essential of due process.

VIII.

ARGUMENT.

FIRST: IN ITS APPLICATION TO APPELLANT, A PRIVATELY OWNED PUBLIC UTILITY CORPORATION, SEATTLE ORDINANCE NO. 62,662 IS REPUGNANT TO THE EQUAL PROTECTION CLAUSE IN SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THAT BY SAID ORDINANCE A LICENSE TAX FOR REVENUE PURPOSES

ONLY, IN THE AMOUNT OF THREE PER CENT OF APPELLANT'S GROSS INCOME FROM ITS LIGHT AND POWER BUSINESS IN THE CITY OF SEATTLE IS IMPOSED UPON APPELLANT AND THE SAME OR A SIMILAR TAX IN FACT AND IN LAW IS NOT IMPOSED UPON APPELLANT'S COMPETITOR IN SAID LIGHT AND POWER BUSINESS IN SAID CITY OF SEATTLE, NAMELY, THE CITY OF SEATTLE, A MUNICIPAL CORPORATION WHICH IS ENGAGED IN SUCH BUSINESS IN A PROPRIETARY CAPACTY (NOT GOVERNMENTAL) AND FOR PROFIT.

The Novel Facts of This Case Warrant Detailed Consideration.

In the City of Seattle there are two public utility corporations which are lawfully engaged in the business of selling electrical energy for light and power purposes to the public for hire. One of these corporations, the appellant, is privately owned. The other corporation, the city, is municipally owned.

The city is engaged in such light and power business and owns and operates same in a proprietary (not governmental) capacity.

Abrams vs. City of Seattle, 60 Wash. 356;

Riddoch vs. State, 68 Wash. 329, 334;

Bjork vs. Tacoma, 76 Wash. 225;

Tobin vs. Seattle, 127 Wash. 664;

Aronson vs. Everett, 136 Wash. 312, 316;

Vilas vs. Manila, 220 U. S. 345, 356;

South Carolina vs. United States, 199 U. S. 437, 462.

The city is engaged in such business for profit. Its capital investment in light and power generating and distribution facilities has been financed by the issuance and sale to the public of revenue bonds. The principal and interest of such revenue bonds are by the laws of the State of Washington (Remington's Revised Statutes of Washington, 9491) under which same were issued and by the expressed terms of each of said bonds payable only out of the gross revenues of its light and power business. In the language of the Washington Supreme Court in its decision in this case (R. 41) such bonds "are a prior lien on the entire income from it (the city's light and power business)—taking precedence even over operating charges." The principal amount of such revenue bonds now outstanding is in excess of thirty million dollars.

The competition between appellant and the city is direct. Persons living in the City of Seattle may purchase electrical energy for light and power purposes only from appellant or the city. Each of the competitors is continuously seeking new customers. Each competitor of necessity is alert to retain its customers against the aggressive efforts of the other to secure same.

The same rates have been and now are charged by the competing corporations. If appellant were to charge a rate higher than that charged by the city, appellant would lose all of its customers.

Appellant's rates are subject to the exclusive regulation of the Department of Public Works of the State of Washington. The city's rates are determined exclusively by its City Council, which is the legislative parent of its Ordinance No. 62,662. The city's rates are not subject to regulation of any kind or character by the State of Washington.

Appellant is required to pay and does pay city, county and state property taxes upon the property owned by it, including its franchise granted by appellee. The city is exempt from such taxes.

The city subsidizes its light and power business by paying itself out of tax supported funds an

amount in excess of $438,000 annually for the electrical energy used for light and power by itself for governmental and other purposes. The city furnishes such energy to itself in quantity and at rates determined solely by its City Council.

Other than that the city is a preferred competitor to the extent indicated by the foregoing facts, the only difference between appellant and the city with respect to the light and power business in which each is engaged is one of ownership. Appellant is privately owned. Appellant's competitor is municipally owned. There is no other difference.

By the city's Ordinance No. 62,662 appellant is subjected to an annual license tax in the amount of three per cent of its gross income from its light and power business. The tax is imposed solely for revenue purposes. The burden of the ordinance tax is not imposed upon the city. Nor is the ordinance enforcible against it. The following quotation from the majority opinion of the Washington Supreme Court clearly and accurately states the facts:

> "The city, in its proprietary capacity, is in competition with appellant in the power and light business. The possible consequence to appellant, if it is subjected to an excise of three per cent on its gross revenues, while its competitor escapes the burden, are too obvious for

discussion. Evidently having such consequences in mind, the city council, by virtue of § 6 of the ordinance, has undertaken to subject the city's power and light business to the tax imposed upon persons and corporations engaging in that business. This is merely a more or less friendly gesture. The city has not allocated, and probably cannot allocate, any of the revenues of its power and light business to the payment of such a tax. Bonds have been issued in excess of $30,000,000 against the revenues from that business; and those bonds are a prior lien on the entire income from it—taking precedence even over operating charges. Conceding that the city's light and power revenues could be subjected to the tax, no machinery is set up in the ordinance to accomplish such an end. Furthermore, in making up its budget for 1932, no provision was made for the levy of general taxes to cover the excise provided for in the ordinance. So the problem must be met as though § 6 had been omitted from the ordinance; as though the city had levied the excise on the appellant and exempted its own light and power business therefrom.

Conceding, for the sake of argument, that to be the situation, counsel for the city seek to sustain the tax against appellant under the doctrine that constitutional limitations on the taxing power do not prevent a reasonable classification of persons and occupations subject to the tax; and that a privately owned light and power business is subject to a different classification than one owned by a municipality—that the one may properly be subjected to the excise and the other exempted." (R. 40.)

The Washington Supreme Court held that under the foregoing facts the city, a municipal cor-

poration (not a sovereign state), for revenue excise tax purposes, may lawfully classify the corporations which are engaged in the light and power business in the City of Seattle into two classes, namely, (1) privately owned corporations, and (2) municipal corporations, and that the city's imposition of the tax prescribed by its Ordinance No. 62,662 only upon the privately owned corporation does not deny it equal protection of the law and that such a classification is not discriminatory, arbitrary, unreasonable or unreal.

Appellant submits that in reaching such result the Supreme Court of Washington erred. The error is not in its failure to recognize established legal principles. It is in the failure to recognize the full significance of the foregoing novel but admitted facts and in the failure to apply to these facts the controlling legal principles.

The Controlling Legal Principles Are Not Novel

For the purpose of excise taxation the legislative body may lawfully classify persons with respect to their business or occupation in so far as there is some reasonable basis for the classification

and provided all in each class are taxed or exempted alike.

Flint vs. Stone Tracy Co., 220 U. S. 107;

Bradley vs. Richmond, 227 U. S. 477;

Truax vs. Corrigan, 257 U. S. 312;

State Board of Tax Commissioners vs. Jackson, 283 U. S. 527.

The classification made, however, may not be arbitrary, capricious, unreasonable, unreal or irrational. Discrimination between persons engaged in the same occupation, when the distinction between those who are taxed and those who are not taxed is based upon an "unnatural fact," or merely constitutes an attempt to favor one class at the expense of another, will not be tolerated. The test is, does it operate upon all those similarly affected and is there just and reasonable basis for making the distinction. The rule is generally stated to be that the classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Ohio Oil Co. vs. Conway, 281 U. S. 146;

Quaker City Cab Co. vs. Pennsylvania, 277 U. S. 389, 402;

Louisville Gas & E. Co. vs. Coleman, 277 U. S. 32, 37;

Power Mfg. Co. vs. Saunders, 274 U. S. 490, 493;

Frost vs. Corporation Commissioner, 278 U. S. 515, 522;

Ohio River & W. R. Co. vs. Ditty, 232 U. S. 576, 590;

Airway Corp. vs. Day, 266 U. S. 69;

Heisler vs. Thomas Colliery Co., 260 U. S. 245;

Royster Guano Co. vs. Virginia, 253 U. S. 412;

Atchison, etc. R. R. Co. vs. Matthews, 174 U. S. 96;

Barbier vs. Connolly, 113 U. S. 27;

Strauder vs. West Virginia, 100 U. S. 303.

In *Quaker City Cab Co. vs. Pennsylvania*, 277 U. S. 390, 402, the rule which in application to the facts of the instant case most clearly indicates the error of which appellant complains is enunciated in the following language:

> "In effect Section 23 divides those operating taxicabs into two classes. The gross receipts of incorporated operators are taxed while those of natural persons and partnerships carrying on the same business are not. *The character of the owner is the sole fact on which the distinction and discrimination are made to depend.* The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference in the source of

the receipts or in the situation or character of the property employed. It follows that the section fails to meet the requirement that a classification to be consistent with the equal protection clause must be based on a real and substantial difference having reasonable relation to the subject of the legislation. *Power Mfg. Co. vs. Saunders, supra.* No decision of this court gives support to such a classification. In no view can it be held to have more than an arbitrary basis. As construed and applied by the state court in this case, the section violates the equal protection clause of the 14th Amendment . . . " (Italics ours.)

IN ITS APPLICATION TO APPELLANT THE ORDINANCE CONTRAVENES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

If in the City of Seattle two privately owned companies, one named A and one named B, were engaged in the light and power business, and the City of Seattle undertook to impose an excise tax the same as the tax here involved upon Company A and exempted or failed to impose the same excise tax upon Company B, would any court, state or federal, for an instant hesitate to hold that such classification would be unreasonable, unreal, arbitrary and capricious, and that thereby Company A was denied that equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States?

In what respect is there any difference between appellant, a privately owned power company, and respondent, City of Seattle, as to the business engaged in by each respectively? It is the same business. The parties are in direct and active competition with each other. Both are in the business for profit. The city is exercising no governmental function and is serving no governmental purpose in engaging in such business in competition with its citizens. Nor is the city seeking to exercise any police power by the imposition of the tax. It is true that the city is not subject to regulation by the State of Washington. It is true that the city is not required to pay any property taxes under the laws of the State of Washington. It is true that the city, by its rates which it alone has power to determine, definitely controls its competitor's earnings. It is true that the city by reason of the fact that it is a city has many advantages over its competitor. But again we ask in what respect is there any difference between appellant and the city as to such business which can possibly warrant a decision that it is "reasonable" for the city to impose the excise tax upon appellant but not upon appellant's competitor, the city itself?

Application of the foregoing principles to the novel facts of this case brands the classification made by the city in its Ordinance No. 62,662 and approved by the Washington Supreme Court, as one which is essentially and palpably discriminatory, arbitrary and unreasonable. The character of the owner "is the sole fact on which the distinction and discrimination are made to depend." There is no other difference. In its application to appellant the ordinance violates the equal protection clause of the Fourteenth Amendment.

The Case of South Carolina Power Company vs. South Carolina Tax Commission, 52 Fed. (2d) 515, Relied Upon by the Supreme Court of the State of Washington, Does Not Sustain the Validity of the Ordinance.

In the majority opinion of the Washington Supreme Court the case of *South Carolina Power Co. vs. South Carolina Tax Commission*, 52 Fed. (2d) 515, is cited as a sustaining authority. The case is not in point for the following reasons:

The tax in that case was imposed by the sovereign state of South Carolina which was not engaged in a proprietary business as a competitor of any privately owned corporation or individual in

any territory, county or city in the state. In the instant case the tax is imposed by a municipality which in a proprietary capacity for profit is in direct and active competition with appellant.

In the State of South Carolina there was no competition any place between a municipality manufacturing or generating electricity and a privately owned company or individual engaged in the same business in the same territory.

On the point for which it is cited by the Washington Supreme Court the decision actually turned upon the following facts (52 Fed. (2d) 515, 520):

> "So far as the exemption accorded municipalities is concerned, a municipality is an agency of the state, and its operations are conducted not for private profit but for the benefit of the public or its citizens. *Irvine vs. Town of Greenwood*, 89 S. C. 511, 72 S. E. 228, 36 L. R. A. (N. S.) 363. Its property and business conducted by it are ordinarily not taxed at all; and legislation of the state taxing or exempting same from taxation is not open to the objection that it offends the equal protection clause of the 14th Amendment. See *Village of Hardwick vs. Wolcott*, 98 Vt. 343, 129 Atl. 159, 39 A. L. R. 1222 and note."

It is at that point that the case ceases to be of any assistance to the city or of any weight in the instant litigation. The reason is that contrary

to the weight of authority and contrary to the law of the State of Washington, the law of the State of South Carolina is that a municipality engaged in the business of manufacturing and generating electricity for the use of its customers is exercising a *governmental* not a proprietary function.

In South Carolina a municipal corporation is not liable for injuries caused by the negligent operation of its electric light plant because:

> " * * * municipal corporations are created solely for public and governmental purposes and that all powers granted to them by the General Assembly under the sanction of the Constitution are to be exercised as public and governmental functions for the benefit of the municipal community."
>
> *Irvine vs. Town of Greenwood*, 89 So. Carolina 511, 72 S. E. 228, 230.

The Supreme Court of South Carolina recognizes this rule to be contrary to that adopted in other states. In the case of *Triplett vs. City of Columbia*, 111 So. Carolina 7, 96 S. E. 675, 1 A. L. R. 349, the court said:

> "In the second place, the courts of most other states recognize a distinction between what are called governmental, and corporate or ministerial, functions in such corporations, while this court has expressly rejected that distinction, and held that all the powers conferred

upon such corporations are to be exercised as governmental powers."

See also:

Mullinax vs. Hambright, 115 South Carolina 22, 104 S. E. 309.

The *annotator* in 43 L. R. A. (N. S.) 863, in referring to the South Carolina rule, states:

"But this holding is contrary to the great weight of authority on the subject as well as to sound reasoning, and in view of the tendency of the times would, if generally adopted, work great injustice to private rights."

The question as to the constitutional validity of the exemption accorded municipal plants under the South Carolina statute was not submitted to or passed upon by this court:

South Carolina Power Co. vs. South Carolina, 286 U. S. 525, 60 Fed. (2d) 528;

Broad River Power Co. vs. Query, 288 U. S. 178.

SECOND: UNDER THE FACTS OF THIS CASE THE IMPOSITION UPON APPELLANT OF THE TAX PRESCRIBED BY SEATTLE ORDINANCE NO. 62,662, INHERENTLY WILL CONSTITUTE AN APPROPRIATION OF APPELLANT'S PROPERTY WITHOUT

COMPENSATION, WILL DEPRIVE APPELLANT OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW, AND WILL DENY APPELLANT EQUAL PROTECTION OF THE LAW, IN CONTRAVENTION OF SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES EVEN THOUGH THE CITY IMPOSED THE SAME TAX UPON ITSELF.

In construing the city's Ordinance No. 62,662 the Washington Supreme Court has definitely held that the ordinance does not impose the tax upon the city.* In clear and concise language the court states:

> "So the problem must be met as though Section 6 had been omitted from the ordinance; as though the city had levied the excise on the appellant and exempted its own light and power business therefrom."

This construction of the ordinance by the State Supreme Court as to the meaning and application thereof will be followed by this court.

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*The facts alleged in the complaint and admitted by the demurrer and the authorities upon which the Supreme Court of Washington based its interpretation of the ordinance are printed in the Appendix. While such facts and authorities are in no respect pertinent to the issues involved in this appeal, it seems in order to make same available for such examination, if any, as may be desired.

Clement National Bank vs. Vermont, 231 U. S. 120, 134;

Dorchy vs. Kansas, 264 U. S. 287, 288;

Edwards Hines Yellow Pine Trustees vs. Martin, 268 U. S. 459, 462, 463, 464;

Frost vs. Railroad Commission, 271 U. S. 583, 592, 593;

Keith vs. Johnson, 271 U. S. 1, 8;

Sioux County vs. National Surety Company, 276 U. S. 238, 240;

Chicago M. St. P. & P. R. Co. vs. Risty, 276 U. S. 567, 570;

Hawks vs. Hamill, 288 U. S. 52.

We quote the language of Mr. Justice Cardozo in *Hawks vs. Hamill*, 288 U. S. 52:

> "Out of two or more meanings that were possible and plausible the State of Oklahoma has picked the one comporting best in the thought of her official spokesman with the 'genius' of her history. The mists of our own uncertainties are scattered when pierced by this authentic evidence of the law of the locality . . ."

We also quote the language of Mr. Justice Butler in *Keith vs. Johnson*, 271 U. S. 1, 8:

> "This court will follow the decisions of the state courts as to the meaning and proper application of the state transfer tax law, any expressions in its earlier decisions to the contrary notwithstanding."

We quote also the language of Mr. Chief Justice Hughes in *Clement National Bank vs. Vermont*, 231 U. S. 120, 134:

> ". . . There is no difficulty in the interpretation of the statute as to the prescribed incidence of the tax, and aside from that, the decision of the state court is controlling as to the persons upon whom the statute fixed responsibility. It was the province of that court to determine what the terms of the statute authorized, commanded or forbade and it is for this court to say whether, in view of its operation, thus delimited, it conflicts with Federal law. . . ."

UNDER THE FACTS IN THIS CASE THE IMPOSITION OF THE TAX UPON APPELLANT INHERENTLY CONSTITUTES A DENIAL OF EQUAL PROTECTION OF THE LAW, REGARDLESS OF PAYMENT OR NONPAYMENT THEREOF BY THE CITY.

If, contrary to law and to the facts, it be assumed that the city could and by its ordinance did actually impose upon itself an annual excise tax of three per cent of the gross income from its light and power business, and if it be further assumed, contrary to the facts, that the city thereupon actually performed the mechanics of paying itself the tax, even then such an ordinance in

its application to appellant would constitute a denial of equal protection of the law. Such a payment by the city would not be a payment in fact. It would constitute nothing more than an idle gesture.

In the first place, the whole theory of a city taxing itself seems to constitute nothing more than a mental mirage. There is no reality or substance to support the theory. The act of a city in taxing itself seems futile and meaningless to the same extent as would be the act of a man tipping himself.

In the second place, under the facts of this case there would and could be no actual payment by the city. To pay the tax (if the ordinance really required payment by the city) the city would transfer the amount thereof from its proprietary light and power pocket to its tax supported general fund pocket. From its tax supported general fund pocket, however, the city, by direction of its city council (which has sole and exclusive authority to do so) annually appropriates a sum in excess of $438,000 for the benefit of its proprietary light and power business. The consideration for such payment is the light and power used by the city in the performance of its various functions. The amount

of such annual payment is not determined by the market value of the light and power which the city sells itself. There is no competition for such business. The city, by its City Council, arbitrarily fixes the rate which it charges itself for such electrical energy and the quantity which it will sell to itself. That rate and quantity may be increased at the will of the city. An increase in the rate or quantity will produce the money necessary to enable the city to pay the self-imposed excise tax. All that is needed for such purpose is a resolution of the City Council. By reason solely of a mere journal entry and or a resolution of the City Council, the city would hope to avoid the constitutional prohibition against the denial of equal protection of the law, without actually paying one penny of the tax which the city ostensibly would have imposed upon itself.

The purported payment of the tax by the city would be only a paper transaction. The book entry crediting the city's general fund with receipt of the tax paid by the city would be offset by another book entry debiting a similar amount against the city's general fund in favor of the city light fund, in ostensible payment of the light and power which the city sells itself. If the ordinance imposed a

tax of $100,000 a year upon the city, in payment thereof (on paper only) $100,000 would go into its general fund pocket, but without even a stoppage in transit said money would return to its point of origin, namely, the city's light and power pocket. Under such facts there is and can be no reality in any payment of the tax by the city.

If by reason of such meaningless mechanics the city is thereby enabled to lawfully extract $120,000 a year from the gross income of its competitor, then equal protection of the law, by the Fourteenth Amendment guaranteed, ceases to exist in fact. To label the gesture as friendly does not cure the inherent evil. To seek a pure motive for the gesture, or to presume good faith on the part of the city cannot change the actual operation and effect of the conduct. These are fixed and determined by the facts. In any imposition of such a tax upon appellant by its competitor under the facts as they are in this case, there is inherently a denial to appellant of equal protection of the law. Imposition of a similar tax by the city upon itself and payment thereof cannot cure such inherent invalidity.

UNDER THE FACTS IN THIS CASE THE IMPOSITION OF THE TAX UPON APPELLANT INHERENTLY CONSTITUTES A DENIAL OF DUE PROCESS OF LAW, REGARDLESS OF PAYMENT OR NONPAYMENT THEREOF BY THE CITY.

The City of Seattle May Not Directly Support and Subsidize Its Proprietary Light and Power Business by Imposing a License Tax Upon Appellant, Its Privately Owned Competitor in Such Business.

If the city were to enact an ordinance which by its expressed terms imposed the license tax upon appellant for the purpose of aiding and subsidizing appellee's proprietary light and power business, such ordinance would be constitutionally invalid for the following reasons:

By such an ordinance appellant would be denied due process of law. By it appellant would be denied equal protection of law. By it appellant would be deprived of its property without compensation. By it, through the exercise of a governmental power of taxation, the city, to the direct aid of its private and proprietary business, would be drawing "sustenance or power to itself through

an assumption of public and governmental functions to the strangulation" of appellant with whom it voluntarily competes. Such an attempt would shock the conscience of any court of equity. Such an ordinance would promptly be declared unconstitutional by reason of the legal principles discussed in the case to be noted, and by reason of the ordinary principles of justice, equity, fair play and honest conduct.

There is no case of record in which any municipality has been bold enough to attempt to impose such a tax upon its competitor for any purpose. *A fortiori* there is no case of record in which any municipality has been bold enough to impose such a tax upon its competitor in aid and subsidy of the proprietary competing utility business owned by the municipality. Hence, it is not strange that the cases of record in which a similar issue has been before the courts are few. If there were no decided cases available as authorities for the legal principles upon which appellant is relying, the novel facts here presented warrant the birth of some new principles. The case of *Los Angeles Gas & Elec. Co. vs. City of Los Angeles*, 241 Fed. 912 (affirmed 251 U. S. 32) is in point, however.

See also:

South Carolina vs. United States, 199 U. S. 437.

In *Los Angeles Gas & Elec. Co. vs. City of Los Angeles*, 241 Fed. 912 (affirmed 251 U. S. 32), the City of Los Angeles in a proprietary capacity was in competition with the privately owned gas and electric company. By ordinance the city "for the immediate preservation of the public peace, health and safety" (the exercise of a governmental power) attempted to require the privately owned utility, at its own expense, to relocate its wires and instrumentalities upon the streets of the City of Los Angeles when necessary to make room for similar instrumentalities to be placed in such streets, for use by the city in the operation of its proprietary business. In the District Court the ordinance was declared invalid for the following reasons (241 Fed. 912, 918):

> "Whatever the city may do under the guise of the police power it must be remembered it does in its governmental capacity. The exercise of the police power has been most aptly and perhaps most comprehensively defined as 'the power to govern' (*License Cases*, 5 How. 504, 582, 12 L. Ed. 256), the 'most illimitable' of all powers of government (*the Slaughterhouse Cases*, 16 Wall. 36, 62, 21 L. Ed. 394), the 'law of overruling necessity' (28 *Cyc.* 692). Whatever the city does, however, in the matter of

actually engaging in the furnishing and delivering of electrical energy to itself and its inhabitants is done in its proprietary or quasi private capacity (citing cases) and the two must always be differentiated in any attempt to define and determine the rights of the city in such a controversy as the present.

"While operating in its private capacity, and considerations of necessity giving rise to an exertion of the police power being nonexistent, as adverted to hereinabove, the power of police is wanting, and may not be asserted in furtherance of that which is merely expedient. In other words, when acting clearly within the domain of its private and proprietary capacity, the city may not draw sustenance or power to itself through an assumption of public and governmental functions. As said by the Supreme Court of the United States in *South Carolina vs. United States*, 199 U. S. 437, ... quoting from a Pennsylvania case where the question of the city supplying gas to its inhabitants was under consideration:

. . "'Such contracts are not made by the municipal corporation, by virtue of its powers of local sovereignty, but in its capacity of a private corporation. The supply of gaslight is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a borough or a city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the private property of the city, as much so as the lands and houses belonging to

it. *Blending the two powers in one grant does not destroy the clear and well-settled distinction*, and the process of separation is not rendered impossible by the confusion. In separating them, regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company. It stands on the same footing as would any individual or body of persons, upon whom the like special franchises had been conferred.' (Italics supplied.)

. . . . . .

"As indicated hereinabove, assuming the necessity, propriety, and expediency of such course to have been satisfactorily determined by those in authority, I am in entire harmony with a plan of municipal improvement such as has been projected in the city of Los Angeles and as is here under consideration. *I am, however, also firmly of the belief that until the city, by purchase, appeal to eminent domain, or otherwise, has lawfully and properly and justly eliminated competition, it must meet its competitors as any other private agency would be compelled to meet them, and must stand, with them in the same relation to the law, and let its success be measured by its ability satisfactorily to serve the public, rather than by its power through the exertion of public functions to occupy a position of supremacy in the field which it deliberately has chosen to invade.*" (Italics supplied.)

Upon appeal to this court the decision of the District Court was affirmed in opinion written by *Mr. Justice McKenna*, (251 U. S. 32).

Under the foregoing authority, if authority be needed, and, under the fundamental principles of justice, equity, fair play, liberty and honest conduct, it is apparent that the city may not lawfully support and subsidize its proprietary light and power business by imposing a license tax upon appellant, its privately owned competitor in such business.

UNDER THE NOVEL FACTS OF THIS CASE THE PRACTICAL AND ACTUAL RESULT WHICH FOLLOWS THE OPERATION OF SEATTLE ORDINANCE NO. 62,662 IN ITS APPLICATION TO APPELLANT IS THAT THE CITY WILL ANNUALLY EXACT $120,000 OR MORE OF APPELLANT IN AID AND SUBSIDY OF THE CITY'S PROPRIETARY LIGHT AND POWER BUSINESS IN ALL RESPECTS THE SAME AS THOUGH SAID TAX WERE IMPOSED SPECIFICALLY FOR SUCH PURPOSE.

The Validity Of A Taxing Ordinance Is To Be Determined By The Practical Results Which Follow Its Operation

It is definitely established that the validity of a tax is to be determined by its true operation and

effect on the basis of the practical results which follow its operation.

Educational Film Corp. vs. Ward, 282 U. S. 379;

McCallen vs. Massachusetts, 279 U. S. 620;

Louisville Gas & Elec. Co. vs. Coleman, 277 U. S. 32;

St. Louis Cotton Compress Co. vs. Arkansas, 260 U. S. 346;

Postal Tel. & Cable Co. vs. Taylor, 192 U. S. 64;

Mugler vs. Kansas, 123 U. S. 623;

Craig vs. Missouri, 4 Peters (U. S.) 410;

Aberdeen Savings & Loan Ass'n. vs. Chase, 157 Wash. 351, 364.

The Novelty Of The Facts In The Case At Bar Compels Careful Consideration Thereof

The true and actual operation and effect of the instant ordinance in its application to appellant can only be determined after careful consideration of the novel facts of this case. There is of record no other case in which a taxing authority has ever attempted to assert its taxing power under a similar state of facts.

Appellant and the city are engaged in the same business. They are in direct and active competition

with each other. Both are engaged in the same business for profit. The city is exercising no governmental function and is serving no governmental purpose in the operation of such business in competition with private citizens. Both appellant and the city are engaged in the same business, for the same purpose and in like capacities.

Appellant may not complain of the normal competition with the city, because appellant's franchise is not exclusive. In such normal competition between the two utility corporations, however, there is an inherent inequality. The city by reason of the fact that it is a municipal corporation has substantial advantages over its privately owned competitor. Appellant is required to pay and does pay state, county and city property taxes. The city is wholly exempt from such taxes. The justification (if any) for this discrimination, patently present in the normal competition between a privately owned and a municipally owned utility, is that ownership of property by the privately owned utility may itself warrant a tax levied for the support of the *general government*. There is no such justification, however, for a discriminatory license tax on the competitive proprietary business measured by the gross revenue thereof. Such a tax is

a direct appropriation, *pro tanto*, of such revenues by the taxpayer's competitor.

Appellant's rates, rules, accounting practices and earnings are rigidly regulated by the State of Washington. The city is exempt from such regulation. (Remington's Revised Statutes 10339 et seq.; 10454.) Appellee's city council has sole and exclusive authority to do as it pleases with respect to the management and operation of its light and power business. In addition to the foregoing, there are advantages to the city, more or less general but nevertheless real, which are incident to the fact that ostensibly it belongs to the people.

The city by its Ordinance No. 62,662 now asserts the right to intensify the inherent inequality and unfairness of this normal competition by drawing sustenance from its competitor through the exercise by the city of a governmental power of excise taxation imposed for revenue purposes only. At this time it seeks three per cent of appellant's annual gross income, which tax for the first year will amount to approximately $120,000. Once the power to impose such a tax upon appellant in any amount is decreed, there will be *per se* no legal or equitable barrier to the imposition of a larger tax. The city can always establish that it needs more

money. The amount of the tax, if there is decreed the power to impose any tax, will be within the legislative discretion of appellee's city council.

The Practical and Actual Result of the Application of the Ordinance to Appellant Will Be the Elimination of Appellant as a Competitor of the City and a Confiscation of Appellant's Business by the City.

This new weapon of competition which the city now asserts the right to use against appellant is inherently destructive of the competition. However large or small may be the amount of the tribute exacted, the actual and practical results which will follow the application of the ordinance to appellant will be the ultimate elimination of appellant from the light and power business in the City of Seattle and the spoliation and confiscation of appellant's business and property by appellee. The reasons follow.

Prior to the imposition of the ordinance tax appellant's rates were reasonable, and its income was and may be no more than adequate to enable it to earn a reasonable return (if any) upon its investment in the business. The State of Washington which has sole and exclusive power to reg-

ulate appellant's rates and income has approved both. The city may not contend to the contrary because it charges the same rates which are charged by appellant.

By its new weapon of competition the city would appropriate three per cent of appellant's gross income, which amount may be one hundred or two hundred per cent of appellant's net income from its business in the City of Seattle. Whatever the amount of the exaction may be, it is in fact an appropriation of appellant's net income, if any, or of its capital, if appellant has no net income after payment of the demanded percentage of its gross income to the city.

However confiscatory the amount of the exaction may be, appellant is without remedy in a court of law or equity, or elsewhere. If in a court of law or equity appellant complained that the amount of the tax is confiscatory, its complaint would be promptly and completely answered by a direction to seek relief from the Department of Public Works of the State of Washington. In that state regulatory body is vested sole power under the laws of the State of Washington to regulate, fix and determine the rates which appellant may charge and the reasonableness of appellant's gross and net income.

There will be no relief for appellant in an application to the Washington Department of Public Works for permission to increase its rates. It is true that upon a presentation of the facts herein stated the state regulatory body could authorize appellant to increase its rates. In the event it failed to do so, appellant could seek protection of the courts by appealing from an adverse finding of the Department. In either event, however, should appellant attempt to increase its rates as authorized by the state or the court, appellant would lose all of its customers. The reason is not obscure. A differential in rates in favor of the city would as effectively eliminate appellant as a competitor as would an outright confiscation of appellant's property by the city.

The resulting differential in rates may not be cured by an attempt to require the city to raise its rates to a level which would enable appellant (charging the same rates) to continue in business in the city and to also pay the three per cent gross income tax demanded by appellee. There is no court or regulatory body which can compel the city to raise its rates. That power is vested solely in appellant's city council. (Remington's Revised Statutes, 9488, 10454.)

There is no uncertainty as to the actual consequences which inherently follow from these facts. Under the unequal and unfair *normal* competition and by reason thereof, appellant's gross income from its business in the City of Seattle may be no larger than is permitted by the city. If the city may exercise the power (now asserted) to appropriate a percentage of appellant's gross income, then appellant will be crushed between the unequal and unfair normal competition and the asserted governmental power of its competitor to appropriate its gross income. Under the facts this will constitute an appropriation of appellant's net income (if any). As appellant's financial stability is weakened and ultimately wholly wrecked by the excise tax exactions required of it by its competitor, the value and earnings of the city's proprietary business will be proportionately enhanced. All of appellant's customers will ultimately become customers of the city. The practical and actual result will be that the city from year to year will appropriate appellant's property and business without payment of compensation for the property and business appropriated. Such partial appropriation from year to year will become total and complete when appellant's financial stability is undermined by the constant and cumulative

flow of its limited gross income to its competitor to an extent that appellant may no longer function as a going concern. To decree such a power to the city is to decree to the city power to annihilate appellant to the direct aid and benefit of the proprietary business of the city.

The injustice inherent in the exercise of such a power by the city is not obscure. For more than thirty years appellant has been rendering a public service to the inhabitants of the City of Seattle. Long prior to the time when the city embarked upon its proprietary venture in said business in direct competition with appellant, such public service was available only through appellant. The capital invested in appellant's business is the legitimate investment of the savings of thousands of individual stockholders. Through the years such investments have been jeopardized by the unfair and unequal privileges granted to appellant's municipally owned competitor. In spite of such inequality and such unfairness, however, appellant has continued to exist as a going concern and has continued to render a real public service. Unless appellant is to be now utterly destroyed by a governmental confiscation of its business and property, it will continue to be a going concern and to render such service. It cannot

so continue if its competitor by the exercise of a governmental excise taxing power may appropriate any portion of appellant's gross or net revenues received for such public service. Against the exercise of such a power appellant is utterly helpless. As direct results of the exercise of such a power by its competitor, the days of appellant's continued existence become numbered, its complete elimination from the light and power business in the City of Seattle becomes inevitable, and the legitimate investments of appellant's 15,000 stockholders become valueless. All of which operates directly to enhance the value of the city's proprietary light and power business.

The foregoing practical and actual results of the application of the ordinance tax to appellant do not follow by reason of the legitimate though unfair and unequal normal competition between appellant and the city. They inherently follow the exercise of a governmental power of excise taxation by the city against its competitor. Under such circumstances appellant may not hope to survive.

By reason of these facts it is asserted that the practical and actual operation and effect of the ordinance in its application to appellant will be that

the city will thereby ultimately eliminate appellant as a competitor and will acquire appellant's business without compensation, all in direct aid and to the direct benefit of the city's proprietary business. In addition thereto, from July 1, 1932, until the elimination is complete, the city will receive annually from appellant a sum in excess of $120,000 for the self-created opportunity of annihilating its competitor. This, appellant submits, constitutes a denial of due process of law.

The Practical and Actual Result of the Application of the Ordinance to Appellant Will Be An Unlawful and Oppressive Governmental Invasion by the City of the Privacy of Appellant's Business to the Direct Aid of Appellant's Competitor and to the Destruction of Appellant.

Sections 15 and 16 of the ordinance provide as follows:

"Section 15. *Taxpayer to Keep Books and Records—Returns Confidential:* It shall be the duty of each taxpayer taxed upon his gross income to keep and enter in a proper book or set of books or records an account which shall accurately reflect the amount of his gross income, which account shall always be open to the inspection of the City Comptroller, or his duly authorized agent, and from which said officer or his agent may verify the return made by the taxpayer.

"The applications, statements or returns made to the City Comptroller, pursuant to this ordinance, shall not be made public, nor shall they be subject to the inspection of any person except the Mayor, the Corporation Counsel, the City Comptroller, or his authorized agent, and members of the City Council."

"Section 16. *Comptroller to Investigate Returns:* If any taxpayer fails to apply for license or make his return, or if the City Comptroller is dissatisfied as to the correctness of the statements made in the application or return of any taxpayer, said officer, or his authorized agent, may enter the premises of such taxpayer at any reasonable time for the purpose of inspecting his books or records of account to ascertain the amount of the fee or tax or to determine the correctness of such statements, as the case may be, and may examine any person under oath administered by said officer, or his agent, touching the matters inquired into, or said officer, or his authorized agent, may fix a time and place for an investigation of the correctness of the return and may issue a subpoena to the taxpayer, or any other person, to attend upon such investigation and there testify, under oath administered by said officer, or his agent, in regard to the matters inquired into and may, by subpoena, require him, or any person, to bring with him such books, records and papers as may be necessary."

The city by said sections of the ordinance asserts the right to inspect the books and records of its competitor. Knowledge of the names and addresses of appellant's customers, the length and terms of the contracts with each, and the income

received from each will be acquired by appellant's competitor. Survival of the competition under such handicaps will be an impossibility. Nor is this oppressiveness of the ordinance and its inherent invalidity diminished by a presumption, promise or hope that the officers and councilmen of the City of Seattle would not unlawfully use the information obtained. As stated in *Roller vs. Holly*, 176 U. S. 398, 409:

> "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."

Mr. Justice Holmes in *Louisville & N. R. Co. vs. Central Stockyards Co.*, 212 U. S. 132, 144, clearly stated the principle:

> "The law itself must save the party's rights and not leave them to the discretion of the courts as such."

A fortiori, the party's rights must not be left to the discretion of a competitor.

The assertion by the city of the extraordinary right to examine the books and records of its competitor, in its actual and true operation and effect, can result only in an unlawful governmental invasion of the privacy of appellant's business and in a governmental confiscation of appellant's prop-

erty, to the material advantage of appellant's competitor. This, appellant submits, constitutes a denial of due process of law.

The Practical and Actual Result of the Application of the Ordinance to Appellant Will Be An Unlawful Depreciation of the Value of Appellant's Property and a Spoliation Thereof and Pro Tanto a Confiscation and Appropriation Thereof by the City Without Compensation.

Under the laws of the State of Washington the city may lawfully appropriate appellant's property by an exercise of the power of eminent domain. As a condition precedent to such an appropriation the city is required to pay appellant the fair market value of its property. That value to a large extent is dependent upon the net earnings of the property. For every dollar taken by the city from appellant's annual gross income (the amount of which is limited by the city's competition) the value of appellant's property is diminished. The greater the amount taken by the city the more the value of appellant's property will be affected. When the maximum has been taken the earning power of appellant's property will be at a minimum. The city, by exercise of its power of eminent domain,

may then acquire the property when the value has been artificially diminished by the city's exercise of governmental taxing power. In the meantime the city will have exacted in excess of $120,000 annually from appellant as an excise tax, which money may be used to pay the amount awarded appellant in such condemnation proceedings.

If, however, the city is not in too great a hurry to wholly remove appellant as its competitor, it may never be necessary for it to attempt to acquire appellant's business and property by an exercise of its power of eminent domain. Under the facts of this case the constant and cumulative appropriation of appellant's gross income from year to year (which by reason of the unfair competition, is in fact an appropriation of appellant's net income, if any), is certain to shorten the life expectancy of appellant as a competitor of the city. Granted the power to impose a tax measured by appellant's gross income, five per cent, or ten per cent thereof, or more, may be taken by the city as lawfully as three per cent. When appellant may no longer remain a going concern by reason of such exactions, the city, without cost to itself, will inherit all of appellant's business.

In application to appellant any exercise of the power asserted by the city will constitute *pro tanto* an appropriation and a confiscation of appellant's business and property from year to year. This, appellant submits, constitutes a denial of due process.

The Vices Complained of Are Inherent in Any Assertion by the City of a Power to Tax Its Competitor, Regardless of the City's Actual or Asserted Motive.

Asserted good faith on the part of the city in the enactment of the ordinance cannot change the foregoing practical and actual results which inherently follow the application thereof to appellant. The assertion by the city that it is not the purpose of the ordinance to strangle and annihilate appellant does not in any respect compensate appellant for the loss of its property and business. Nor does such an assertion diminish the pain, anguish and finality of appellant's electrocution by its competitor. Nor does it make lawful that which in its operation and effect is inherently unlawful. The vices complained of are inherent in any assertion by the city of a power to impose such a tax upon its competitor under the facts herein conceded.

THE SUPREME COURT OF WASHINGTON IS IN ERROR IN ITS STATEMENT: "THE QUESTION IS: CAN THE STATE'S POWER OF TAXATION BE ABRIDGED OR ABROGATED BY ESTOPPEL?"

It is respectfully submitted that a majority of the Supreme Court of the State of Washington erroneously failed to apply the controlling legal principles to the facts of this case. In the opinion of the majority it is stated:

> "The question is: Can the state's power of taxation be abridged or abrogated by estoppel? In the abstract, the question would seem to merit scant consideration; but the allegations of the amended complaint reveal a condition of unfair competition created by the exaction of this tax from the appellant, which commands the careful attention of a court of equity."

The real question presented involves a problem larger than is within the scope of the foregoing restricted statement of the issue. It is not the sovereign, the state, which is imposing the ordinance tax. There is involved much more than is indicated by the use of the word "estoppel." Such word does not adequately reflect the legal principle which is here controlling. That principle is akin to estoppel perhaps, but it is more than that. Nor do the words "abridged or abrogated" seem o be

appropriate or adequate. There is involved more than an abridgement or an abrogation.

The city departed from its governmental domain when it entered the field of private business in competition with its citizens. By its own act, to that extent the city ceased to function as a governmental agency and placed itself upon the level of its citizens. Such act of the city changed its status to the extent that in the competitive field of private business it was no greater than its competitors. That act of the city did not abrogate or abridge any of its governmental powers which could thereafter be lawfully exercised. That act did, however, give birth to a new status, one of the attributes of which was, that in the field of private business in which the city had voluntarily embarked it became subject to the same constitutional rights, prohibitions and restrictions to which its citizens were subject. Thereafter, in the language of Mr. Justice Steinert of the Washington Supreme Court (R. 48), appellee may not ". . . draw sustenance from its competitor through an assumption of public and governmental functions, to the strangulation of the one with whom it voluntarily competes."

If by reason of its voluntary competition, the city may not exact a license tax of its competitor,

the obstacle to such an exaction is not *per se* in the field of estoppel. The real obstacle is the supreme law of the land. It is the Constitution of the United States. It is the Constitution of the State of Washington. It is the principle contained in the maxim cited in the majority opinion, *salus populi suprema lex*.

The language of the District Court in *Los Angeles Gas & Electric Co vs. City of Los Angeles*, 211 Fed. 912 (affirmed 251 U. S. 32), seems clearly in point:

> "I am, however, also firmly of the belief that until the city, by purchase, appeal to eminent domain, or otherwise, has lawfully and properly and justly eliminated competition, it must meet its competitors as any other private agency would be compelled to meet them, and must stand with them in the same relation to the law, and let its success be measured by its ability satisfactorily to serve the public, rather than by its power through the exertion of public functions to occupy a position of supremacy in the field which it deliberately has chosen to invade."

The City May Not Lawfully Be Witness, Prosecutor, Judge, Jury and Executioner in the Elimination of Its Competitor and in the Appropriation of Its Competitor's Property.

Regardless of legal theories, noble purposes, or alleged friendly gestures, it is impossible to escape

from one definite and certain, although irregular, fact, namely: To permit the city to exact the tax in question of appellant and to exercise the asserted right to examine appellant's books is to decree the destruction of appellant by its competitor. The city creates the facts which operate to bring about such destruction. The city, by exercise of a governmental power to impose an excise tax for revenue purposes, demands tribute of its competitor. The city thereby asserts itself as sole witness, prosecutor, judge, jury and executioner in the elimination of appellant as its competitor. The elimination accomplished, the city in its proprietary capacity becomes appellant's sole beneficiary. There seems to be no principle of social justice yet advanced which countenances such a governmental conscription of private property. Every fundamental principle of fair play, equity, justice and liberty brands such a conscription as a denial of due process of law.

Under the foregoing facts and decisions it is submitted that Seattle Ordinance No. 62,662 in application to appellant, inherently will operate as an oppressive and confiscatory exercise by the city of a governmental power of taxation in aid of its proprietary business; that the application thereof to appellant will unlawfully eliminate appellant as

competitor of the city, will constitute an unlawful and oppressive governmental invasion of the privacy of appellant's business, will result in a spoliation of appellant's business and property, and will constitute an appropriation thereof by the city without compensation, all in contravention of Section 1 of the Fourteenth Amendment. It is further submitted that the inherent constitutional invalidity of the ordinance in its application to appellant is not in any respect cured by the asserted good faith of the city. Nor can such invalidity in any respect be cured by the imposition of a similar tax by the city upon itself.

THIRD: SEATTLE ORDINANCE NO. 62,662 REQUIRES APPELLANT AS A CONDITION PRECEDENT TO THE LAWFUL CONTINUANCE OF ITS BUSINESS IN THE CITY OF SEATTLE TO SECURE AND PAY FOR A LICENSE. THIS REQUIREMENT CONSTITUTES AN IMPAIRMENT OF THE FRANCHISE CONTRACT BETWEEN APPELLANT AND THE CITY IN CONTRAVENTION OF ARTICLE I, SECTION 10, OF THE CONSTITUTION OF THE UNITED STATES.

UNDER PENALTY OF FINE AND IMPRISONMENT THE ORDINANCE PROHIBITS THE CONTINUANCE OF APPELLANT'S BUSINESS IN THE CITY OF SEATTLE UNLESS APPELLANT SECURES AND PAYS FOR A LICENSE.

There is no uncertainty about the requirements of the Seattle ordinance. In Section 3 thereof it is provided:

> "'*Occupation License' Required:* After the first day of July, 1932, no person shall engage in or carry on any business, occupation, pursuit or privilege for which a license fee or tax is imposed by this ordinance without having first obtained and being the holder of a valid and subsisting license so to do, to be known as an 'Occupation License' . . ."

and it is further provided that—

> "Any taxpayer who engages in or carries on any business subject to tax hereunder without having his 'Occupation License' so to do shall be guilty of a violation of this ordinance for *each day* (italics ours) during which the business is so engaged in or carried on, and any taxpayer who fails or refuses to pay the license fee or tax, or any part thereof, on or before the due date shall be deemed to be operating without having his license so to do."

Under this ordinance it is unlawful for appellant to engage in the light and power business without securing a license. The license required is not

a mere receipt. Unless appellant applies for a license and by paying three per cent of its gross income secures same, appellant may not lawfully continue in business in the City of Seattle.

The penalty for attempting to transact business without the license is severe. Section 24 of the ordinance provides:

> "Section 24. *Penalty:* Any person violating or failing to comply with any of the provisions of this ordinance or any lawful rule or regulation adopted by the City Comptroller pursuant thereto, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by fine in any sum not to exceed three hundred ($300) dollars, or by imprisonment in the city jail for a term not exceeding ninety (90) days, or by both such fine and imprisonment."

Under this ordinance, if appellant fails to apply for and secure the specified license, it must cease doing business in the City of Seattle. Otherwise, appellant becomes subject to heavy fines and its officers will be sent to jail.

APPELLANT'S FRANCHISE IS A LICENSE FROM THE CITY TO ENGAGE IN AND CONTINUE ITS LIGHT AND POWER BUSINESS IN THE CITY OF SEATTLE UNTIL MARCH 14, 1952.

Appellant by virtue of its franchise contract with the city has a complete and unqualified license

and privilege to "engage in and carry on" the light and power business in the City of Seattle until the expiration thereof. The granting clause of said franchise reads as follows:

> "That there be and hereby is granted to S. L. Shuffleton, his successors and assigns (appellant is his assignee) the right, authority and franchise, *on the conditions and for the considerations in this ordinance expressed, to construct, maintain and operate* equipment and apparatus for an underground electric system, and to erect and maintain poles, wires and appurtenances for the distribution of electric light, heat and power in, over and under the streets, alleys and public places of the City of Seattle. This right, authority and franchise is intended to apply to all streets, alleys and public places of said city, now or hereafter existing, subject to the terms and conditions hereinafter expressed; and said grantee, his successors and assigns, by accepting this ordinance, covenant that within three years from the approval of this ordinance he or they will have *in operation* a system extending to all streets and parts of streets now lighted by electricity."

The term of the franchise is for fifty years, which will expire March 14, 1952.

Section 15 of the franchise ordinance reads as follows:

> "Section 15. *Subject to Repeal or Modification:* This grant is subject to the right of the city council at any time hereafter to repeal, change or modify this grant if the franchise

granted hereby is not *operated* in accordance with the provisions of this ordinance, or at all . . ."

When appellant accepted said franchise and in reliance thereon fully complied with all the requirements thereof by the timely investment of large sums of money in facilities for the manufacture and distribution of light and power in the City of Seattle, appellant thereby acquired from the City of Seattle a vested property right, namely, the right to engage in such business during the entire term of the franchise. By reason of its franchise and the continuous operation of its business thereunder appellant owns the right to transact such business in the City of Seattle. To refrain from destroying or impairing that right is an obligation of the City of Seattle.

By its franchise appellant secured more than a bare permit to place its poles and wires in or under the streets of the city. The franchise is an *operating* franchise. It is a license to *operate*. By its terms it is subject to repeal, change or modification only for failure to *operate* in accordance with the provisions thereof or at all. Under said franchise the burden and duty of *continuous operation* are imposed upon appellant.

Appellant is a public utility company. Its property is dedicated to a public use. It may not cease the transaction of business at will. The City of Seattle may not authorize it to quit business. Nor may the City of Seattle compel appellant to cease doing business in the city unless appellee appropriates appellant's property by an exercise of the power of eminent domain.

Appellant's franchise from the city is a complete and unqualified license to do everything that the city may lawfully license appellant to do so far as "engaging in and carrying on" its light and power business in the city.

The Ordinance Impairs the Obligation of the Franchise Contract.

The ordinance in the case at bar makes it unlawful for appellant to exercise the privilege granted by the franchise contract unless appellant complies with the ordinance requirements. By the ordinance the city would now require appellant to secure a license, to open its private records of customers and accounts to its competitor, and to pay the city annually three per cent of appellant's gross income, all as conditions precedent to the continued lawful exercise by appellant of the rights granted by the

franchise contract. Failure to comply with the ordinance requirements will subject appellant and its officers to penalties of fine and imprisonment. Unless a court is to rewrite the ordinance which the City of Seattle has enacted, there seems to be no escape from the conclusion that in its application to appellant these added requirements constitute an impairment of the obligation of the franchise contract.

The following cases are selected from the many authorities which establish the law upon which appellant relies:

Dartmouth College Case, 4 Wheat. 518;

Pacific Tel. & Tel. Co. vs. Everett, 97 Wash. 259, 271;

Hot Springs Elec. Co. vs. Hot Springs, 70 Ark. 300;

New York Electric Line vs. Empire City Subway Co., 235 U. S. 179;

Los Angeles vs. Los Angeles Gas & E. Corp., 251 U. S. 32, 39.

Unusually pertinent is the language of Mr. Justice McKenna in *Los Angeles vs. Los Angeles Gas & Elec. Corp.*, 251 U. S. 32, 39:

> "A franchise conveys rights, and if their exercise could be prevented or destroyed by a simple declaration of a municipal council, they

would be infirm indeed in tenure and substance. It is to be remembered that they come into existence by compact, having, therefore, its sanction, urged by reciprocal benefits, and are intended and can only be exercised by expenditure of money, making them a matter of investments and property, and entitled as such against being taken without the proper process of law,—the payment of compensation."

Appellant is not here contending against the established law that exemption from taxation is never presumed. *St. Louis vs. United Railways Co.*, 210 U. S. 266; *New Orleans City, etc. Co. vs. New Orleans*, 143 U. S. 192. It is the law that while a state or city by contract may deprive itself of the power to exercise a right *conferred by law to collect taxes or license fees*, such deprivations can only follow when the state or city has concluded itself by the use of unequivocal terms.

In the case at bar, however, appellant's franchise from the city is a *license*. By that franchise the city did unequivocally grant appellant a *license* to engage in its business in the City of Seattle until 1952. The city may not now impair the obligation of that franchise by requiring appellant to secure and pay for another license. When the city granted appellant that franchise it exhausted its power to require appellant during the life of said franchise

to secure from it a license to continue the business authorized thereby. To permit the city now to require appellant to secure and pay $120,000 (or more) annually for a license, before appellant may continue the conduct of the business which the franchise not only authorizes but requires appellant to continuously operate throughout the life thereof, will impair the obligation of the city to appellant under the franchise contract, in contravention of Article I, Section 10, of the Constitution of the United States.

FOURTH: SEATTLE ORDINANCE NO. 62,662 IS REPUGNANT TO THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THAT THE DEFINITION OF "GROSS INCOME" IN SECTION 2 THEREOF IS VAGUE, INDEFINITE AND UNCERTAIN.

THE ORDINANCE DEFINITION OF "GROSS INCOME" IS SO VAGUE, INDEFINITE AND UNCERTAIN THAT THE TAXPAYER MUST GUESS AT ITS MEANING.

The license fee or tax which the ordinance requires of the appellant (Section 5 (c) thereof) is a fee or tax equal to three per cent of the total "gross

income" of appellant from its "light and power business in the city." The ordinance defines the term "gross income" as follows (Section 2):

> "Section 2: *Definitions:* In construing the provisions of this ordinance, save when otherwise plainly declared or clearly apparent from the context, the following definitions shall be applied:
>
> GROSS INCOME: The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not), by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein; and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness, or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses."

Is the above definition of gross income clear, definite and certain? Does the word "value" as used in the definition import "cost price," "sale price," or "net profit" on the sale of tangible property or service? Who shall say? How is a taxpayer to know? The answers are not furnished by the ordinance.

What do the words "value proceeding or accruing from the sale of tangible property or service" import? What is the value which proceeds or accrues from the sale of tangible property or services? Is it the gross amount received by the seller or is it the net profit made by the seller from that particular sale? Who is to determine the amount? What rule is to be followed? The ordinance does not furnish the answers.

The word "receipts" as used in the definition expressly excludes receipts or proceeds from the *use* or sale of real property. Appellant is engaged in the electric light and power business. Appellant's equipment of a value of millions of dollars is housed in and to a large part is permanently affixed to buildings which are a part of the realty. Are receipts from that source *pro tanto* to be deducted? Who can determine the proportion of the receipts from any electric light and power business which are not attributable to the use of real property? Who shall say? How is the taxpayer to know? How may the amount be determined? Where in the ordinance may the answers be found?

What is meant by the words "and receipts * * * by reason of the investment of capital in the business engaged in?" Who can determine the amount

of receipts "by reason of the investment of capital" in a light and power business? Who can determine the receipts that are not in any respect due to the investment of capital but are attributable to the variable skill of management and labor, or "the capacity for business of the managers or owners?" *State vs. Express Co.*, 60 N. H. 219-244. The ordinance does not furnish the answers.

What does the phrase "gross income from such business in the city" mean? Does it mean the total amount of money taken in by appellant in the City of Seattle by reason of the investment of capital inside the city limits? If so, it includes large sums of money arising in part by reason of the investment of capital outside the city. Does it mean only the amount received by appellant from its subscribers living inside the city and the exclusion of the receipts derived from subscribers living outside the city, but which receipts are in part the product of capital invested inside the city limits? The ordinance does not furnish the answers.

What proportion of appellant's receipts is attributable to the investment of capital in the City of Seattle? What proportion of these receipts is attributable to the investment of capital outside the City of Seattle? What proportion of these receipts

is attributable to the skill of management and labor? What proportion arises from the use of real property inside and outside the City of Seattle?

It is submitted that only by guessing may any taxpayer engaged in the light and power business determine the amount of the tax imposed by said ordinance. The penalty for a wrong guess is a heavy fine and imprisonment.

AN ACT IN TERMS SO VAGUE THAT MEN OF COMMON INTELLIGENCE MUST GUESS ITS MEANING AND DIFFER AS TO ITS APPLICATION VIOLATES THE FIRST ESSENTIAL OF DUE PROCESS.

There is no uncertainty as to the applicable legal principles. From the many cases available, appellant cites the following:

Connally vs. General Const. Co., 269 U. S. 385;

Champlin Refining Co. vs. Corporation Comm. of Okla., 286 U. S. 210;

International Harvester Corp. vs. Kentucky, 234 U. S. 216, 222;

Collins vs. Kentucky, 234 U. S. 634, 638;

United States vs. Cohen Grocery Co., 255 U. S. 81.

Small Company vs. American Sugar Refining Co., 267 U. S. 233;

Cline vs. Frink Dairy Co., 274 U.S. 445, 455;

Smith vs. Cahoon, 283 U. S. 553;

In re: Di Torio, 8 Fed. (2d) 279, 281;

State ex rel. Crow vs. West Side St. Ry. Co., 146 Mo. 145, 155;

Western Union Telegraph Co. vs. State of Texas, 62 Tex. 630;

State vs. Humble Pipe Line Co., 112 Texas 375; 247 S. W. 1082, 1085.

The rule is clearly stated by Mr. Justice Sutherland in *Connally vs. General Construction Co.*, 269 U. S. 385 at 391, as follows:

> "That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well recognized requirement, consonant alike with ordinary notions of *fair play* and the *settled rules of law*. And a statute which either forbids or requires the doing of an act in terms so *vague* that men of common intelligence must necessarily guess at its meaning and differ as to its application, *violates the first essential of due process of law*."

In *Champlin Refining Co. vs. Corporation Commissioner of Oklahoma*, 286 U. S. 210, 242, Mr. Justice Butler states the rule as follows:

> "The general expressions employed here are not known to the common law or shown to have any meaning in the oil industry sufficiently

definite to enable those familiar with the operation of oil wells to apply them with any reasonable degree of certainty. The meaning of the word 'waste' necessarily depends upon many factors subject to frequent changes. No act or definite course of conduct is specified as controlling and, upon the trial of one charged with committing waste in violation of the act the court could not foresee or prescribe the scope of the inquiry that reasonably might have a bearing or be necessary in determining whether in fact there had been waste. It is no more definite than would be a mere command that wells shall not be operated in any way that is detrimental to the public interest in respect of the production of crude oil. And the ascertainment of the facts necessary for the application of the rule of proportionate production laid down in Section 4 would require regular gauging of all producing wells in each field, a work far beyond anything that reasonably may be required of a producer in order to determine whether in the operation of his wells he is committing an offense against the act.

"In the light of our decisions, it appears upon a mere inspection that these general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law. It is not the penalty itself that is invalid but the exaction of obedience to a rule or standard that is so vague and indefinite as to be really no rule or standard at all. *United States vs. L. Cohen Grocery*, 255 U. S. 81, 89, 41 S. Ct. 298, 65 L. ed. 516, 14 A. L. R. 1045; *Small Co. vs. Am. Sugar Ref. Co.*, 267 U. S. 233, 239, 45 S. Ct. 295, 69 L. ed. 589; *Connally vs. General Construction Co., supra; Cline vs. Frink Dairy Co.*,

274 U. S. 445, 454, 47 S. Ct. 681, 71 L. ed. 1146; *Smith vs. Cahoon*, 283 U. S. 553, 51 S. Ct. 582, 75 L. ed. 1264."

Appellant also quotes the language of Mr. Justice Van Devanter from *Small Co. vs. American Sugar Refining Co.*, 267 U. S. 233, 239:

> "The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all. Any other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it, was equally within the principle of those cases. They have been so construed and applied by other courts in civil proceedings."

This rule has been universally followed in the state courts. It is stated in the following quotation from *State vs. Humble Pipe Line Co.*, 112 Texas 375, 247 S. W. 1082, 1085:

> "In the case last cited (*Western Union Tel. Co. vs. State of Texas*, 62 Tex. 630) Judge Stayton said:
>
> "'It is of the utmost importance, for the protection of the taxpayer, that tax laws should be certain, both as to the thing taxed and as to the amount of the tax, and the manner for its ascertainment; that the taxpayer may have an opportunity, without the expense of litigation,

> to pay such taxes as he may owe; and a tax law which does not accomplish this purpose ought to be held invalid, whether this results from an attempted exercise of power not possessed, through which the law becomes uncertain by both proper and improper subjects being combined, and selected for taxation, or by the failure of the legislature for any other reason to furnish the rules by which taxes may be levied, assessed and collected."

The case of *State ex rel. Attorney General vs. West Side Street Ry. Co.*, 140 Mo. 145, 155; 47 S. W. 959, 961, is directly in point, as is demonstrated by the following quotation therefrom:

> "Upon what gross earnings is the percentage to be computed? A large capital must be invested in the machinery and appliances for conducting a street railway, aside from the tracks laid in the streets. The act seems to contemplate that the bid shall be a percentage only of the receipts derived from the use and occupation of the public property. How is the proper proportion of the gross earnings that should be attributed to the capital invested in the power stations, machinery, etc., to be ascertained? Shall it be by valuing the entire plant, and deducting therefrom the proper valuation of the machinery, and apportioning the gross earnings according to these amounts? If so, how shall this value be fixed and by whom? The act furnishes no answer."

Application of the foregoing legal principles to the ordinance definition of "gross income" war-

raints only the conclusion that the ordinance violates the "first essential of due process of law." The definition of "gross income" is so vague, indefinite and uncertain that it is only possible to guess at its meaning.

CONCLUSION.

Similar appeals of Pacific Telephone & Telegraph Company (No. 364) and Seattle Gas Company (No. 359) are pending in this court. In each of these appeals the validity of said Seattle ordinance No. 62,682 is challenged. Such appeals will probably be heard at the same time this appeal is considered. Each of said companies, as appellant, will file briefs containing points, authorities and arguments against the validity of the ordinance which are applicable to the facts in the instant appeal. If permissible in this court, appellant hereby adopts and asserts each and every applicable point contained in the briefs of said companies, to the end that burdensome reiteration may be reduced to a minimum. This was permitted in the trial court and in the Supreme Court of the State of Washington.

For the several reasons hereinbefore stated, the judgment of the Supreme Court of the State of Washington herein should be reversed.

Respectfully submitted,

ELMER E. TODD,
FRANK E. HOLMAN,
WILLIAM M. ALLEN,
CLARENCE R. INNIS;
Counsel for Appellant.

Hoge Building,
Seattle, Washington.

APPENDIX.

THE FACTS AND THE CASES CONSIDERED BY THE SUPREME COURT OF WASHINGTON AS TO EXEMPTION OF THE CITY OF SEATTLE FROM LIABILITY FOR TAX IMPOSED BY ORDINANCE NO. 62,662.

The extent to which Ordinance No. 62,662 is obligatory upon the city in the sense of compelling a general fund contribution from the gross revenues of its light and power business equivalent to the tax exacted from appellant was before the Supreme Court of Washington. As pointed out in the brief, that court held that the validity of the ordinance in its application to appellant must be considered as if no tax or equivalent contribution is exacted from the city.

The considerations which led the Washington Supreme Court to this conclusion, as advanced by appellant in that court, are as follows:

The test of the validity of a law is not what may be done under the law but what is required to be done thereunder:

Coe vs. Armour Fertilizer Works, 237 U. S. 413;

Roller vs. Holly, 176 U. S. 398, 409;

Louisville & N. R. Co. vs. Central Stockyards Co., 212 U. S. 132;

Stuart vs. Palmer, 74 N. Y. 183, 188;

Colon vs. Lisk, 153 N. Y. 188, 194;

State vs. Peterson, 27 Wyo. 185;

12 Corpus Juris, Constitutional Law, Sec. 219, p. 786.

Under the Charter of the City of Seattle (Article VIII, Sec. 9, as amended March 14, 1913), all revenues due to the City of Seattle for electricity sold by its lighting utility must be collected by the city treasurer, and the said moneys are required to be kept by him in a separate fund (R. 6).

The general fund of the city, which is tax supported, is established in Article IX, Section 16, Fourth, of the city charter, which reads as follows:

> "Section 16. *Funds Established and Defined:* The following funds are hereby established:
>
> "Fourth. *General Fund, Accounts:* The general fund, into which shall be paid all revenues of the city, except as otherwise provided by law, and from which shall be paid all expenses and liabilities of the city which are not payable out of special funds . . ."

Transfer of money from one fund of the city to another may not be made, except as provided in

Article IX, Section 17, of the Seattle charter (R. 6), which reads:

> ". . . No transfer shall be made from one fund to another except as otherwise provided in this charter, unless by an affirmative vote of a majority of the members elected of the city council by ayes and noes recorded in the journal of proceedings . . ."

Under Article IX, Section 6, of the city charter (R. 6), the city treasurer may "not pay out any moneys belonging to the city except upon legal demands, allowed and audited in the manner prescribed in this charter or by law."

The duties of the treasurer are specified, in Article IX, Section 7 (R. 6), as follows:

> "It shall be the duty of the city treasurer to receipt for the moneys of the city and to pay out the same *only on warrants* drawn in pursuance of the *order of the city council* and signed and registered by the city comptroller . . ."

The City of Seattle, being a city of the first class, is subject to the requirements of the Washington budget law (Remington's Revised Statutes, Sec. 9000-13). Under this law the estimated expenditures of each department and the estimated revenues of the city for the ensuing year are submitted to the council. Public hearings for the pur-

pose of giving any person interested a chance to be heard are required. The council may not increase the total amount allowed to each department in the preliminary estimate of the expenses of the department submitted by the head thereof (R. 7).

After the public hearing, and after the council has made such changes in the estimates as it may make, the law requires that the budget be then, on or before the first Monday in October, adopted by the council as the final budget for the succeeding year. "Each and every city official and employe" is limited in the making of such expenditures and in the incurring of liabilities "to the amounts of such detailed budget," except as otherwise provided in Section 9000-19 (Remington's Revised Statutes).

Under the last-mentioned section of the state law machinery is provided for the creation of an emergency fund. Upon the occurrence of certain specific catastrophes or emergencies not here pertinent, or to "meet *mandatory* expenditures required by laws enacted since the last budget was adopted, the council may, by an ordinance passed by three-fourths of all its members, authorize the expenditure of sufficient money from the emergency fund to meet the expenses or obligations so caused or imposed."

The ordinance does not *require* payment of the tax by the City of Seattle. The only pertinent provision of the ordinance is that "*so far as permitted by law*" Subdivision (c) of Section 5 of the ordinance shall be applicable to the City of Seattle, but the city "shall not as a taxpayer be required to conform to the other provisions of this ordinance."

The ordinance does not specify that the City of Seattle *shall pay* the tax. If the city fails to pay itself the tax, how may payment be enforced? By whom? Against whom?

The ordinance does not *require* the city to pay the tax out of the revenues received by it from its electricity customers. It would be perfectly consistent with the ordinance for the city to pay said tax out of its general fund. (Seattle Charter, Article IX, Section 16, *supra*.)

The ordinance does not *require* any officer or employe of the city to make a return of the gross revenues received by the city from its electricity customers.

The ordinance does not *authorize* any city officer to draw a warrant for payment of the tax.

The ordinance does not *require* the city to collect from its electricity customers the additional amount necessary to enable it to actually add to the revenue of the city the sum required to pay the tax.

In the Seattle budget for 1932 there is no item included which would permit the lawful payment of the tax by the city for any part of the year 1932. No provision for the payment of the 1932 tax may be made out of any emergency fund until the city council so directs by an ordinance passed by three-fourths of its members, and even if there be money in the emergency fund that fund in the Seattle 1932 budget is one item of the general fund. The total revenues of the city's light fund are by the 1932 budget wholly consumed by the items therein included. From what source is it possible for the city to lawfully take the money necessary to pay itself the 1932 tax?

All revenue collected by the City of Seattle from its electricity customers must be placed in the city light fund. (Seattle Charter, Article VIII, Section 9.) Such funds may not be transferred to any other fund of the city "*unless by an affirmative vote of a majority of the members elected of the*

city council by ayes and noes reported in the journal of proceedings."

Future affirmative legislative action by a majority of the members of the city council is required before any lawful transfer of any funds from the city light fund to the city general fund may be made. Such future affirmative legislative action will be required before the city may even pay itself the tax specified in the ordinance for the year 1932 or for any year subsequent thereto. What court can compel such legislative action? If the city council in good faith intended to require the city to pay itself the amount of the tax provided in the ordinance, it would have enacted an ordinance in form far different from the form of the ordinance under attack.

The city is not subject to any of the penalties of the ordinance.

The money received by the city from its electrical energy business is owned by the city in no different capacity from that in which the city owns the money which is in its General Fund. If there be a surplus of $100,000 in the City Light Fund, that $100,000 belongs to the City of Seattle. It may use it as it pleases. It may reduce its rates; it may

expend it for plant improvements; it may place it in the General Fund. Whatever may be the machinery by which it is done or the purpose of the transfer, the fact is that a transfer by the City of Seattle of money from its City Light Fund to its General Fund (if the ordinance did make such a transfer obligatory, which appellant denies), would constitute nothing more than an idle gesture—a mere bookkeeping transaction. In its true operation and effect it would mean absolutely nothing. The city would be merely taking money which it already owns out of one of its pockets and placing it in another of its pockets. The city would only be tipping itself.

Annually from the General Fund of the city there is transferred to the City Light Fund of the city several hundred thousand dollars (in 1932 it was in excess of $438,750) in payment for electrical energy furnished by the city to the city for the purpose of lighting the city streets and other municipal purposes. The rate at which this energy is sold by the city to the city is fixed and determined by appellee's city council. No bids are received. There is no competition as to such business. There is no legal limit to the amount of money that may be thus transferred from the city's General Fund to

its City Light Fund. If the city should go through the motion of transferring $100,000 a year from its light fund to its general fund for the purpose of ostensibly paying the tax, such a transfer could be nothing more than an idle gesture. It would in no respect constitute payment in fact. A slight increase in the rate the city agrees to pay itself for the energy it buys from itself will effectively bring back from the general fund to "City Light" the full amount ostensibly paid by appellant's competitor as the revenue license tax specified in the ordinance (R. 31).

The first revenue bonds issued by the city in connection with the development of its lighting utility were issued in 1917. The total amount of such revenue bonds which were outstanding on December 31, 1931, was approximately $32,852,000 (R. 6).

These revenue bonds have been issued under authority granted by the legislature of the State of Washington. (Sec. 9491, Remington.) They are obligations only against the special fund created and established in Section 5 of each of the various ordinances authorizing the issuance of the bonds. Under the provisions of each of said ordinances

there is created a special fund to be called "Municipal Light Extension Bond Fund ....." The special fund for each issue is designated by including after the word "Fund" in the name, the year in which the particular issue is authorized. The special fund thus designated is to be "drawn upon for the sole purpose of paying the interest, or the principal and interest, of said bonds." Thirty days prior to the respective dates on which interest, or principal and interest, of said bonds becomes due the city treasurer is required to pay into the special fund *"certain fixed amounts of the gross revenues of"* the city owned lighting utility, equivalent to the respective amounts of interest, or principal and interest, so falling due upon any and all of the bonds then outstanding (R. 6).

The *gross revenues* of the city from its lighting utility are pledged to such payments, "which shall constitute a charge upon such revenues *prior and superior to all other charges whatsoever, including charges for maintenance and operation.* . . . ".

The city is by each of the ordinances obligated "to establish from time to time and maintain such rates for electric energy as will provide sufficient

revenues to permit the payment of said sums into such special funds, which the city is pledged to set aside for the payment of principal and interest, as herein provided, to be applied to the payment of the principal and interest of the bonds herein authorized, until such bonds shall have been paid in full, and in addition thereto all costs of operation and maintenance . . ."

With such positive prior pledge of the *gross revenues* of its lighting utility, a pledge thereof "prior and superior to all other charges whatsoever," the Seattle city council is wholly without power or authority to *legally* require a diversion of three per cent of said gross revenues to the general fund of the city for the purpose of paying the tax in question. The most that the city council may lawfully do in the premises (and even this it has not done) would be to obligate the city to make such a transfer and payment, if, when and as there may be sufficient gross revenues from the lighting utility to satisfy the prior pledge thereof to the payment of the bond interest and principal as same become due, and the costs of maintenance and operation, and a surplus in excess thereof sufficient to permit the payment of the tax prescribed by the ordinance under discussion. The uncertainty of any

such surplus, particularly since the ordinance does not require the city to collect the additional revenues needed to pay the tax from the customers, clearly indicates that the attempt to make the ordinance applicable to the City of Seattle was, is and can be only an idle gesture. Certainty in the obligation on the part of the city to pay is essential. An obligation only to pay if there is anything available to use for money is insufficient.

A binding legal obligation, under penalty of $300.00 a day and imprisonment for failure to meet it, placed upon the privately owned utility is not equaled by an expression of the city council of a willingness to pay if there is anything left with which to pay, after payment of prior lawful pledges made by council of the only funds from which the tax may be lawfully paid by the city.

FILE COPY

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OCTOBER TERM, 1932

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Appellant,

vs.

THE CITY OF SEATTLE, a municipal corporation,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEE

A. C. VAN SOELEN,
Corporation Counsel.

WALTER L. BAUMGARTNER,
Assistant.

C. V. HOARD,
Counsel for Appellee.

515 County-City Building,
Seattle, Washington.

THE ARGUS PRESS - SEATTLE

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WALTER L. BAUMGARTNER,
Assistant.
C. V. HOARD,
Counsel for Appellee.
515 County-City Building,
Seattle, Washington.

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

This litigation is here for review of a judgment of the Supreme Court of the State of Washington affirming a judgment and decree of dismissal by the trial court after sustaining a general demurrer to the amended complaint (R. 63, 37). The trial court also ordered paragraph XVI (R. 9), embodying conclusions of law and fact, stricken (R. 33, 34) but no point is made of it here. Companion to this case are the related cases respectively entitled, *The Pacific Tel. & Tel. Co. v. The City of Seattle*, No. 364, October Term, 1933, and *Seattle Gas Co. v. City of Seattle*, No. 359, said term.

Were the facts in this case not "novel," in the

sense that no prior adjudication of similar facts has been made by this court, appellant would have no standing here whatever.

Bared of surplusage, legal and factual conclusions and repetitions, the pleaded facts, with proper inferences therefrom, and judicial knowledge present the following case.

The appellant is a Massachusetts utility corporation, the appellee a municipal corporation and a city of the first class of the State of Washington. They will sometimes be referred to herein as the Power Company or the Company, and the City, respectively.

Their present differences arose over the adoption by the City of, and its consequent attempt to enforce against the appellant, the provisions of Ordinance No. 62662 imposing a license or occupation tax upon persons, firms and corporations, and upon itself, for the privilege of engaging in the business of selling electric light and power in the City, measured by three per cent of the total gross income from such business in the City.

These taxes commenced to accrue July 1, 1932, when the appellant applied for, by the filing of a return of its gross income for the year 1931, the required license and paid under protest (R. 27) the sum of $9697.75 (R. 8), the first monthly installment of its tax. Thereafter it filed the complaint herein (R. 1) seeking in a first cause of action the recovery of the amount so paid and in a second cause of action an injunction against the collection of any further amounts.

The City accepted appellant's return of its gross

income without question, and asserted claim to further monthly installments of tax computed thereon (R. 16).

The power of the City of Seattle to adopt such a revenue measure was first conferred upon it in 1890 (Session Laws of the State of Washington, 1889-90, pp. 215, 223, cl. Thirty-third; *Fleetwood v. Read* (1899) 21 Wash. 547) and has ever since been retained by it (Rem. Rev. Stat., § 8966, cl. Thirty-third; *Pac. Tel. & Tel. Co. v. Seattle*, 72 Wash. Dec. 503 (R. 48)).

In 1890 the Legislature authorized any incorporated city or town within the State to construct or purchase and maintain "gas works or electric light plants for the purpose of lighting streets and public places and supplying lights to the inhabitants of such cities and towns, with full authority to regulate and control the same" (Session Laws of the State of Washington, 1889-90, p. 520). This authority was amplified in 1899 (Session Laws, State of Washington, 1899, p. 250, Ch. 78) appearing with subsequent amendments as Rem. Rev. Stat., §9488, *et seq.*

In the exercise of the power and authority so conferred, the City on March 4, 1902, by popular vote, committed itself to the acquisition or construction and operation of a light plant and system for the purpose of furnishing light and power to itself and its inhabitants (R. 5) and is still maintaining and operating that enterprise (R. 1, 2).

For the purpose of initiating the said plant and system, the City issued general obligation bonds, of which the principal sum of $1,447,000 is still out-

standing (R. 5). It is significant that the record is silent in regard to payment by the City of any of such general bonds out of general tax moneys although lawfully payable therefrom.

The development of the major portion of the system has been financed by the issuance and sale of utility revenue bonds, of which the principal sum of approximately $32,852,000 is still outstanding, which bonds are payable only out of the gross revenues received by the City from the sale of electric light and power. The gross revenues are devoted entirely to the maintenance and operation of the system and the payment of the principal and interest of the bonds. It is not shown whether the City realizes more than sufficient for these purposes, notwithstanding that it possesses "full authority to regulate and control the use, distribution and price" of electricity sold by it "for lighting, heating, fuel and power purposes, public and private" (Rem. Rev. Stat., §9488).

The City, naturally, is its own customer for electric current for street lighting and other municipal and governmental purposes (R. 3). In obedience to duty enjoined upon it by law (Rem. Rev. Stat., Title 64, Ch. 6, §9953) the City annually transfers from its tax supported General Fund to the light utility revenue fund a sum determined upon after public hearing (Rem. Rev. Stat., Title 60, Ch. 9, §9000-16; Aplt's Br. pp. 100, 101) to be the "true and full value" of the electric current so used. The amount set aside in the 1932 budget for this purpose was $438,750.00 (R. 3).

Under the Washington Constitution, adopted in 1889, before the appellant, or its predecessors, entered the utility business in Seattle all of the City's property, as well as that of the State and United States, whether governmental or proprietary, is exempted from taxation as property (Washington Constitution, Art. VII, § 2, and Amendment 14).

On March 12, 1902, a few days *after* the City had adopted its first ordinance inaugurating its own light plant, the appellant's franchise, known as the Shuffleton Franchise, was granted by the City by Ordinance No. 7894 and was accepted by the grantees on March 27, 1902. The grantees were given the right, privilege and authority to construct, maintain and operate equipment and apparatus for an underground electric system and to erect and maintain poles, wires and appurtenances for the distribution of electric light, heat and power *in, over and under the streets, alleys and public places of the City* for a term of fifty years, ending in 1952 (R. 3, 4). Pursuant to the franchise the grantees, and later the appellant, constructed and acquired power plants and distribution facilities which have since been continuously operated (R. 4).

The City has no power or control over the rates for electric current sold by the Company. The Company fixes its own rates (Rem. Rev. Stat., §§ 10363, 10364, 10365), subject, however, to change by the Washington Department of Public Works, the utility regulatory body, upon complaint and after hearing (*Idem*, § 10390).

Inescapably the appellant and the City are com-

petitors in the same field within the City for light and power customers and solicit the same, one from the other and from the open field. Consequently the rates of both have been, and are, the same (R. 3). The record shows no "coercion" of customers by either.

It was in the circumstances just described and under the necessity of raising revenue to maintain its governmental functions that the City adopted its Ordinance No. 62662, the validity of which is here assailed. It is set out in part in the record herein at page 18 and in full in the records of related cases No. 359 (R. 21) and No. 364 (R. 14), October Term, 1933. It is also set out in full in Appendix A hereto.

EPITOME OF APPELLANT'S ARGUMENT

To assist the reader in more easily grasping the issues, we epitomize appellant's argument.

First: Seattle Ordinance No. 62662, in so far as it imposes an occupation or license tax upon the appellant, is repugnant to the equal protection clause of the Fourteenth Amendment, because the same or a similar tax is not in fact or in law imposed upon the City, appellant's competitor in the light and power business, there being under the circumstances no reasonable ground for classification.

Second: The questioned tax upon appellant, notwithstanding a similar tax is laid upon the City, will deny appellant equal protection and will constitute a taking without compensation, and a deprivation without due process, of appellant's property, in violence of the Fourteenth Amendment. The ordinance will have this effect because—

Transfer of funds from the City's Light Fund to its General Fund in satisfaction of its tax is not a payment in fact;

Any tax paid by the appellant to the City will subsidize the City's light and power enterprise to the eventual confiscation and spoilation of appellant's business and property; and

The ordinance provision for inspection by City officers of books and records required to be kept by appellant for the purpose of verifying the amount of taxes due will result in disclosure of business secrets, of which the City will take unfair advantage.

Third: The ordinance requirement that appellant secure an occupation license as a condition to the

continuance of its business in the city impairs the obligation of the franchise contract granting appellant the right to operate its light and power plant and system and contravenes Article I, Section 10, of the Constitution.

Fourth: The ordinance definition of "gross income" is so vague, indefinite and uncertain as to deny due process vouchsafed by the Fourteenth Amendment.

SUMMARY OF APPELLEE'S ARGUMENT

First: The ordinance applied to appellant does not transgress the equal protection clause of the fourteenth amendment because—

A. Under the ordinance both the appellant and the City are taxed;

B. If the tax upon the City is ineffective, it is due to want of power in that behalf. Impotence in respect to itself does not also render the City impotent in dealing with the power company. If paramount law operates in favor of a portion of a class, in this case the City, the Fourteenth Amendment does not afford the remainder of that class, in this case the Power Company, a refuge against the exercise of the power to tax;

C. If the tax upon the City is ineffective, the City's situation and the inherent differences between appellant's and the City's utility are sufficient to sustain a tax upon the one and not the other.

Second: The charge that the city, in enforcing the tax against appellant, even though the city meets the tax upon itself, will deny appellant equal protection of the laws, take its property without compensation, deprive it of its property without due process, is not sensibly founded upon any provision of the ordinance or any fact or circumstance in the record or elsewhere. The charge is supported only by the appellant's expression of fear and apprehension, which cannot avail, for—

A. Equity does no allay mere fear and apprehension.

B. Conjectural future abuse of the power of taxa-

tion under the provisions of the ordinance, is no denial of the existence of the power exerted.

Third: The ordinance requirement that appellant secure an occupation license as a condition to its continuance in the pursuit of its business in the city does not impair any obligation of its franchise contract.

A. The ordinance does not penalize the failure to obtain the license except as a mode of collecting the tax and is, therefore, not an unlawful interference with the contract.

B. Appellant's franchise is neither a license of such character as authorizes it to carry on the light and power business in the City nor an exemption from license or occupation taxation.

C. In any event, the City never had, nor has it, any authority to contract away its power of taxation.

Fourth: The ordinance definition of "gross income" as applied to appellant is neither in fact nor in law vague, indefinite or uncertain.

ARGUMENT

In approaching the problems presented in this appeal, we will be pardoned for harking back to a review of the attitude of this Court toward local legislation and judicial decision supporting it.

> "But whatever the tribunal, in questions of this kind great caution must be used in overruling the decision of the local authorities, or in allowing it to be overruled. No doubt this court has gone a certain distance in that direction. *Dobbins v. Los Angeles*, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; *Lochner v. New York*, 198 U. S. 45, 58, *et seq.*, 49 L. ed. 937, 942, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133. But it has expressed through the mouth of the same judge who delivered the judgment in the case last cited the great reluctance that it feels to interfere with the deliberate decisions of the highest court of the state whose people are directly concerned. *Welch v. Swasey*, 214 U. S. 91, 106, 53 L. ed. 923, 930, 29 Sup. Ct. Rep. 567. The reluctance must be redoubled when, as here, the opinion of that court confirms a specific determination concerning the same spot, previously reached by the body that made the law. See *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 341, 45 L. ed. 879, 888, 21 Sup. Ct. Rep. 625; *Smith v. Worcester*, 182 Mass. 232, 234, 235, 59 L. R. A. 728, 65 N. E. 40.
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> "But the propriety of deferring a good deal to the tribunals on the spot is not the only ground for caution. If every member of this

bench clearly agreed that burying grounds were centers of safety, and thought the board of supervisors and the supreme court of California wholly wrong, it would not dispose of the case. There are other things to be considered. Opinions still may be divided, and if, on the hypothesis that the danger is real, the ordinance would be valid, we should not overthrow it merely because of our adherence to the other belief."

Laurel Hill Cemetery v. San Francisco (1910) 216 U. S. 358, 365, 54 L. ed. 515, 519.

Ordinances, as other laws, stand before the bar of justice clothed with a presumption of validity and the burden is upon him who asserts their infirmity.

Zahn v. Bd. Pub. Wks., 274 U. S. 325, 71 L. ed. 1074;

Home Telephone & Telegraph Co. v. Los Angeles, 211 U. S. 265, 281, 53 L. ed. 176, 186.

First: The ordinance applied to appellant does not transgress the equal protection clause of the Fourteenth Amendment because—

A. Under the ordinance both the appellant and the City are taxed;

B. If the tax upon the City is ineffective, it is due to want of power in that behalf. Impotence in respect to itself does not also render the City impotent in dealing with the Power Company. If paramount law operates in favor of a portion of a class, in this case the City, the Fourteenth Amendment does not

afford the remainder of that class, in this case the Power Company, a refuge against the exercise of the power to tax;

C. If the tax upon the City is ineffective, the City's situation and the inherent differences between appellant's and the City's utility are sufficient to sustain a tax upon the one and not the other.

A. UNDER THE ORDINANCE BOTH THE APPELLANT AND THE CITY ARE TAXED.

Were it not for the manifest effort of the City and its officers to be fair in according the same treatment to the appellant and the City's utility, we would be inclined to rest content with appellant's protestations that the tax upon the City's utility is futile, since we will later show that the futility, if any, cannot work to appellant's advantage. The ordinance provides:

> "Section 5. Occupations Subject to Tax—Amount: There are hereby levied and shall be collected annual license fees or occupation taxes against the persons on account of the business activities, and in the amounts to be determined by the application of the rates against gross income, as follows:
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> * * * * * *
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> "(b) Upon every person engaged in or carrying on the business of selling or furnishing gas and/or water for hire, a fee or tax equal to three per cent (3%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the

license is required; provided, however, that the minimum fee or tax shall not be less than One Thousand ($1,000.00) Dollars per tax year.

"(c) Upon every person engaged in or carrying on the business of selling or furnishing electric light and power, a fee or tax equal to three per cent (3%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than Two Hundred Fifty ($250.00) Dollars per tax year.

* * * * * *

"Section 6. City of Seattle Subject to Tax: Subdivisions (b) and (c) of Section 5 shall, so far as permitted by law, be applicable to the City of Seattle, except that said City shall not, as a taxpayer, be required to conform to the other provisions of this ordinance." (R. 20)

Of the enactment in Section 6, the Washington Supreme Court said:

"The city, in its proprietary capacity, is in competition with appellant in the power and light business. The possible consequences to appellant, if it is subjected to an excise of three per cent on its gross revenues, while its competitor escapes the burden, are too obvious for discussion. Evidently having such consequences in mind the city council, by virtue of § 6 of the ordinance, has undertaken to subject the city's power and light business to the tax imposed

upon persons and corporations engaging in that business.

"This is merely a more or less friendly gesture. The city has not allocated, and probably cannot allocate, any of the revenues of its power and light business to the payment of such a tax. Bonds have been issued in excess of $30,000,000 against the revenues from that business; and those bonds are a prior lien on the entire income from it—taking precedence even over operating charges. Conceding that the city's light and power revenues could be subjected to the tax, no machinery is set up in the ordinance to accomplish such an end. Furthermore, in making up its budget for 1932, no provision was made for the levy of general taxes to cover the excise provided for in the ordinance. So the problem must be met as though § 6 had been omitted from the ordinance; as though the city had levied the excise on the appellant and exempted its own light and power business therefrom.

"Conceding, for the sake of argument, that to be the situation, counsel for the city seek to sustain the tax against appellant under the doctrine that constitutional limitations on the taxing power do not prevent a reasonable classification of persons and occupations subject to the tax; and that a privately owned light and power business is subject to a different classification than one owned by a municipality—that the one may properly be subjected to the excise and the other exempted.

> "In passing, it is to be noted that the ordinance is a good faith exercise by the city of its power to impose excise taxes for the purpose of raising revenue. Some half dozen businesses enjoying peculiar privileges in and upon the streets of the city are included within its purview. The fact that it imposes a burden upon appellant not borne by the city in its competing business, is an incident and not the purpose of the ordinance." (R. 40, 41; 72 Wash. Dec. 519, 521)

We regret to say that the pronouncement concerning the City's liability for the tax was made without benefit of full presentation by counsel for the City who felt, in view of established legal principles, that any effort to demonstrate the validity of the tax upon the City was more or less immaterial.

If this pronouncement were decisive of the point discussed, this Court would feel itself bound. It is evident, however, that the Washington court merely speculated without intent to decide. The statement that the City had not allocated, and probably could not allocate, any of the revenues of its power and light business to the payment of the tax by reason of the supposed prior lien on such revenues in favor of outstanding utility revenue bonds was taken from the appellant's complaint (R. 5, 6; Complaint, Par. IX). There never has been a decisive judicial determination of the status of utility revenues with respect to the supposed lien, although the matter has been in litigation. Light upon the character of this lien is shed by the opinion of Circuit Judge Hunt

appearing in 29 Fed. (2d) 254, where in a suit by the present appellant against the present appellee, attempt was made to establish utility revenue bonds almost identical with those at bar as a prior lien upon gross revenues. The Circuit Court there held, however, that the pledge of gross revenues to the payment of the bonds did not create a lien *in gross* on all such revenues.

The observation of the Washington court—"Conceding that the City's light and power revenues could be subjected to the tax, no machinery is set up in the ordinance to accomplish such an end. Furthermore, in making up its budget for 1932, no provision was made for the levy of general taxes to cover the excise provided for in the ordinance,"—is obviously not decisive.

It was not necessary to set up such machinery because both the City Charter and the State budget law for cities supply it. It appears from Article IX, Section 17, of the Seattle City Charter, quoted at page 100 of appellant's brief, that the City Council may transfer funds from the City's Light Fund to the City's tax supported General Fund to meet the tax. Under the terms of the budget law (Rem. Rev. Stat., Title 60, Ch. 9) Section 9000-18 thereof, the City Council is directed after the budget is made up, wherein it may include an item chargeable to the light utility fund for payment of the tax, to not later than the 15th day of December "appropriate the specific amounts to the several departments as herein specified, and the several heads of departments, boards and officers shall thereafter be author-

ized to expend such sums so appropriated for the purposes stated in said ordinance in the proper administration of the city's affairs." When the amount has been so appropriated for the tax, it falls to the administrative officers to respect the appropriations and to obey the provisions of the tax ordinance in question. If the State should exact a similar privilege tax of the City, its payment would be effected in exactly the same manner though the taxing act contained no machinery to enable the City to respond.

The failure of the City Council to set up in the 1932 budget an item for payment of the tax is excusable, since the ordinance imposing it was neither conceived nor in existence at the time that budget was being framed. However, this failure did not prevent the payment of the tax, since it was chargeable to, and was charged against, the items for operation in the respective utility budgets.

We state, in passing, that these utility taxes, whether considered as charges to operation or capital account, may not be met by a resort to the City's tax supported General Fund.

Asia v. Seattle, 119 Wash. 674; 206 Pac. 366;

Twichell v. Seattle, 106 Wash. 32; 179 Pac. 127.

We are moved by another consideration which impels the conculsion that the tax is laid upon the City as well as upon the appellant. When a city essays to fix utility rates for its own utilities and others, it is wielding the police power and is as much bound thereby as are others.

City of Seymour v. Texas Elec. Service Co. (C. C. A., Aug. 28, 1933) 68 Fed. (2d) 814, 817;

City of Farmersville v. Texas-Louisiana Pr. Co. (Oct. 29, 1932, unreported) 55 S. W. (2d) 195;

Inc. Town of Mapleton v. Iowa Pub. Service Co. (1929) 209 Iowa 400, 223 N. W. 476, 68 A. L. R. 993;

Inc. Town of Sibley v. Ocheyedan Elec. Co., 194 Iowa 950, 187 N. W. 560;

Economic Gas Co. v. City of Los Angeles, 168 Cal. 448, 143 Pac. 717.

In the *Seymour* case, *supra*, Judge Hutcheson, writing the decision, said:

> "It is, that though in owning and operating a utility plant a city acts not in a governmental but in a proprietary capacity, when the council, exerting the power to regulate, comes to fix rates it represents not the city, as proprietor, but the state, as regulator. It exerts not the contractual power of the city, but the sovereign power of the state." (Citing cases)

If this be so as to the police power, it must also be true of the taxing power.

B. IF THE TAX UPON THE CITY IS INEFFECTIVE, IT IS BECAUSE OF WANT OF POWER IN THAT BEHALF. IMPOTENCE IN RESPECT TO ITSELF DOES NOT ALSO RENDER THE CITY IMPOTENT IN DEALING WITH THE POWER COMPANY. IF PARAMOUNT LAW OPERATES IN FAVOR OF A PORTION OF A CLASS, IN

THIS CASE THE CITY, THE FOURTEENTH AMENDMENT DOES NOT AFFORD THE REMAINDER OF THAT CLASS, IN THIS CASE THE POWER COMPANY, A REFUGE AGAINST THE EXERCISE BY THE CITY OF ITS POWER TO TAX.

Since, as we have just seen, it is both practicable and lawful for the City to pay the tax without setting up the machinery therefor in the ordinance, any failure of the ordinance to bind the City in respect to the tax upon it must result from the operation of a higher law in protection of the utility revenue bondholders. If this Court should so conclude, though we doubt that it will in view of the fact that it is reluctant to determine so grave a question as a collateral issue, especially in the absence of important facts, yet in the light of prior decisions of this court, the City is not by the equal protection clause of the 14th Amendment forestalled, estopped or restrained from taxing the appellant, though it be a competitor of the City. If, in the matter of the tax, the City must defer to constitutional provisions prohibiting the impairment of contract obligations with bondholders, the City is not guilty of discrimination against, or denial of equal protection to, the appellant. It has done all within its power to place itself and the appellant on a parity.

In *Raley & Bros. v. Richardson*, 264 U. S. 157, 159, 68 L. ed. 615, 616, this Court, through Mr. Justice Sutherland, wrote:

> "There is nothing in the contention that, because, under the construction placed upon the statute by the state courts, the tax falls upon

those engaged in domestic business, and does not fall upon those engaged in interstate business, it is void for inequality. It would be a strange application of the equality provision of the 14th Amendment to say that because a state is forbidden by a paramount law to impose a tax upon some merchants, it is therefore powerless to impose it upon other merchants to whom the restriction does not apply. It is enough if the state observe the rule of equality among the persons subject to its taxing power."

Mr. Justice MacReynolds, in *Union Bank & Trust Co. v. Phelps*, 288 U. S. 181, 187, 77 L. ed. 687, 690, wrote:

"To accept the doctrine that as the States can only tax a Federal instrumentality when permitted by Congress, therefore they cannot tax competitors of such instrumentalities within their general jurisdiction in some other fashion without violating the Fourteenth Amendment, would be both illogical and destructive of their proper independence."

Des Moines Nat'l Bank v. Fairweather, 263 U. S. 103, 116, 117, 68 L. ed. 191, 199, 200;

Williams v. Walsh, 222 U. S. 415, 420, 56 L. ed. 253, 255;

Brooks v. State (Unreported) 58 S. W. 1032;

State v. Thomas Cruse Savings Bank, 21 Mont. 50, 52 Pac. 733.

In the *Brooks* case, *supra*, the Texas court wrote:

"It is not within the limits of the authority

of the state to levy an occupation tax upon national banks. The fact that the state has no authority to enforce the law against national banks does not make it void for the want of uniformity. It is equal and uniform on the same class of subjects within the limits of the authority of the state to tax."

Let us for a moment approach the question from another angle. Suppose the City, assuming power to do so, had granted in a franchise contract an exemption from license taxation to electric utility Corporation A. Imagine further that Corporation A was competing in the same business with Corporation B which was not favored with such exemption. Could it be successfully contended that the City had, under the 14th Amendment, disqualified itself from exacting a revenue license of Corporation B? The question is easily answered in the negative in view of the above cases.

C. If the Tax Upon the City Is Ineffective, the City's Situation and the Inherent Differences Between Appellant's and the City's Utility Are Sufficient to Sustain a Tax Upon the One and Not Upon the Other.

Closely akin to the principle just discussed is the rule that in levying taxes classifications may be made for the purpose of levying different amounts upon different classes or to exempt one class and tax the other if there be a reasonable basis for the distinctions made. We interject parenthetically to point out that legislative classification presupposes power to

deal with all subjects to be classified. If it is found that the City may not, because of its situation, impose the tax upon itself and yet taxes the appellant, the only subjects in the field in the light and power business, the result is that *by operation of law* a classification is created.

In *Packer Corp. v. Utah*, 285 U. S. 105, 76 L. ed. 643, it appeared that the Utah legislature prohibited cigarette and tobacco advertising in that state. After its supreme court had held such prohibition void as applied to newspaper advertising circulated in other states, the legislature amended the act to exclude advertising in newspapers and periodicals from the operation of the act. In the decision sustaining the act as against a billboard advertiser claiming denial of equal protection, Mr. Justice Brandeis said (285 U. S. 109):

> "The classification alleged to be arbitrary was made in order to comply with the requirement of the Federal Constitution as interpreted and applied by the highest court of the state. Action by a state taken to observe one prohibition of the Constitution does not entail the violation of another (citing cases). It is a reasonable ground of classification that the state has power to legislate with respect to persons in certain situations and not with respect to those in a different one."

In support of the classification which results if the appellant be correct as to the tax upon the city, the Washington Supreme Court relied, among other authorities, upon the decision in *South Carolina Power*

Co. v. South Carolina Tax Com. (denial of interloctory injunction affirmed, 286 U. S. 525, 76 L. ed. 1268; affirmed on merits under title of *Broad River Power Co. v. Query*, 288 U. S. 178, 77 L. ed. 685) in the following language:

> "In the case of *South Carolina Power Co. v. South Carolina Tax Commission*, 52 Fed. (2d) 515, a statutory three judge court applied this rule to the identical problem with which we are here confronted. An act of the legislature imposing an excise on persons and companies generating electricity by hydro-electric and steam power was under consideration. The act contained the following proviso:
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> " 'Provided, *further*, that the provisions of this Act shall not apply to municipalties manufacturing or generating electricity for the use of its customers.'
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> "In answer to the contention that this was an unreasonable classification, Mr. Justice Parker, speaking for the court, said:
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> " 'So far as the exemption accorded municipalities is concerned, a municipality is an agency of the state, and its operations are conducted, not for private profit, but for the benefit of the public or its citizens. *Irvine v. Town of Greenwood*, 89 S. C. 511, 72 S. E. 228, 36 L. R. A. (N. S.) 363. Its property and business conducted by it are ordinarily not taxed at all; and legislation of the state taxing or exempting same from taxation is not open to the objection that it offends the equal protection clause of the Four-

teenth Amendment. See *Village of Hardwick v. Wolcott*, 98 Vt. 343, 129 A. 159, 39 A. L. R. 1222 and note'."

The appellant seeks to demonstrate that the decision in the *South Carolina* case is not pertinent, on the ground that in that state municipal corporations in the operation of municipal light plants are immune from actions for injuries caused by negligence in that pursuit, held by the state court to be governmental in character. We submit that whether a municipal electric light plant be regarded as a governmental or a proprietary function, it tenders to its private competitors the same problems. So far as appellant is concerned, there is no magic in the word "governmental" applied to a city light plant.

In *Giant Tiger Corp. v. Bd. of Com'rs. of Trenton* (Sept. 27, 1933) 168 Atl. 309, the New Jersey supreme court sustained an ordinance of the city imposing license taxes upon the business of operating public markets, exempting open air markets, the only one of which was operated by the city.

In *Springfield Gas & Elec. Co. v. City of Springfield*, 257 U. S. 66, 69, 66 L. ed. 131, 133, this Court, speaking through Mr. Justice Holmes, decided that there were sufficient distinctions between publicly and privately-owned electric plants to sustain an act of the State of Illinois placing only the privately-owned plants under the jurisdiction of its Public Utility Commission as to rates. The plaintiff there made the same argument advanced here, to which the Court answered:

"The plaintiff's argument, shortly stated, is

that, in selling electricity, the city stands like any other party engaged in a commercial enterprise, and that to leave it free in the matter of charges while the plaintiff is subject to the public utilities board is to deny to the plaintiff the equal protection of the laws. But we agree with the Supreme Court of the State that the difference between the two types of corporation warrants the different treatment that they have received.

"The private corporation, whatever its public duties, is organized for private ends, and may be presumed to intend to make whatever profit the business will allow. The municipal corporation is allowed to go into the business only on the theory that thereby the public welfare will be subserved. So far as gain is an object, it is a gain to a public body, and must be used for public ends. Those who manage the work cannot lawfully make private profit their aim, as the plaintiff's directors not only may but must. * * * But the fact that the municipality owned the plant for which its counsel fixed the rate was supposed to disqualify its officers, at least when other plants were submitted to the judgment of strangers. But a city council has no such interest in the city's electric plant as to make it incompetent to fix the rates. Whatever the value of the distinction between the private and public functions of the municipality, the duty of its governing board in this respect, as we have

said, is public and narrowly fixed by the act. * * *."

In 1920, while Seattle was operating its municipal railway system, it adopted an ordinance regulating the operation of certain kinds of for-hire motor vehicles upon the city's streets. Plaintiffs in *Schoenfeld v. Seattle*, 265 Fed. 726, objected to the ordinance on the ground, among others, that the City could not exercise its power of regulation to affect beneficially its proprietary interest. Judge Neterer, writing the opinion for the statutory three-judge court, said at page 731:

> "There is no merit in the contention that the city, being the owner of the street car system in the city, acts in relation to this issue in its proprietary or business relation, and that in such relation it has a status as an individual or private corporation, and may not for the purpose of advancing its proprietary or business interest legislate with relation to the use of the street by the plaintiff, where the result of such legislation would affect beneficially its proprietary interest. The proprietary relation of the city does not take from it the power to exercise in its governmental function to say whether the operation of 200 'jitney busses' upon the streets occupied by street car lines should be regulated with relation to the common use of such streets by the public. What has been said disposes of the further contention that the city is powerless to legislate with relation to the fares."

Well known principles of law do not recognize

competition as a bar to classification of competitors. Reference is made to:

State Board of Tax Commissioners v. Jackson, 283 U. S. 527, 75 L. ed. 1248;

Heisler v. Thomas Colliery Co., 260 U. S. 245, 67 L. ed. 237;

Quong Wing v. Kirkendall, 223 U. S. 59, 56 L. ed. 350;

Armour Pkg. Co. v. Lacey, 200 U. S. 226, 50 L. ed. 451;

Cargill Co. v. Minnesota, 180 U. S. 452, 45 L. ed. 619.

If the City's General Fund should suffer the loss of the tax due from its Light Fund, that ought not to release the appellant from its obligation.

Southern Realty Corp. v. McCallum (C. C. A.) 65 Fed. (2d) 934, 937.

Statutory discrimination in favor of a certain class is not arbitrary if the discrimination is founded upon reasonable distinctions. This is judicial and legislative dogma. Distinctions between public and private utilities in the City of Seattle abound:

1. Between the appellant and the City there is no difference in respect to the product each sells. But the City's plant and system is operated for service—not for profit, while the sole aim of appellant's enterprise is profit.

2. If any surplus, or so-called profit, accrues to the City, the same may be used only for corporate uses and purposes in the state, the benefit of which accrues, in part, at least, to the appellant. Appellant's profits accrue to its stockholders, many of

whom are nonresidents of the state and whose share of profits do not reach the channels of trade in the state.

3. The appellant is owned and controlled by stockholders, whose only interest in the business is profit, and who, conceivably residents of Africa, Boston, New York or South America, have little or no interest in the civic and community life of the City. On the other hand, City light is owned by that nameless and ever changing mass of citizens organized as the City of Seattle. These citizens are, for the most part, taxpayers and home owners. They have no interest in the City light except to see that it furnishes service.

4. The City may borrow money for its enterprises only in the manner pointed out by the statutes and its charter. It may not borrow for its utilities upon its promissory note. The appellant may borrow money at will, either by notes or bond issues, the terms of which are fixed by the borrower and the lender.

5. The City is not authorized to sell its product, except surplus, if any, outside its corporate limits. (*Municipal League of Bremerton v. Tacoma*, 166 Wash. 82). Appellant may sell its product in or out of the state, wherever it finds a profitable market.

6. The City is bound by statute and charter provisions in the making of its contracts for construction. The appellant is free to contract as it wills.

7. The City's proprietary enterprise is governed and supervised by public officers with fixed terms who are elected and appointed according to law. They

may or may not be in sympathy with public enterprise. Appellant's officers may be hired and discharged at will. Loyalty is the price of their bread.

8. The City may not avail itself of the bankruptcy laws to avoid overwhelming financial burdens. Appellant has this privilege.

9. The City may not own or hold stock in subsidiary or auxiliary lighting or gas companies or acquire control of them for the purpose of overcoming competition or for the purpose of forming a business alliance for the sale of light or power to them.

10. The City makes its own rates for electrical energy. The appellant makes its own rates subject to change by the Washington Department of Public Works upon complaint and after hearing.

11. The state has power over the rights and property of cities, whether held in a governmental or proprietary capacity, which is unrestricted by the contract, due process or equal protection clauses of the Federal Constitution. (*Trenton v. New Jersey*, 262 U. S. 182, 67 L. ed. 937; *Newark v. New Jersey*, 262 U. S. 192, 67 L. ed. 943). The state has no such power over private utility corporations.

Notwithstanding the competition between public and private electric utilities and in recognition of differences between them, Congress on June 16, 1933 (c. 96, § 6(a), 48 Stat. 256), asserting its power of classification, imposed only upon private electric utilities an excise tax in the amount of 3% of the price for which electrical energy is sold for domestic or commercial consumption. The section appears in

U. S. C. A., Title 26 (1933 Sup.) as Section 616 and reads in part as follows:

> "(a) There is hereby imposed upon electrical energy sold for domestic or commercial consumption and not for resale a tax equivalent to 3 per centum of the price for which so sold, to be paid by the vendor under such rules and regulations as the commissioner, with the approval of the secretary, shall prescribe * * *.
>
> "(c) * * * None of the provisions of this section shall apply to publicly owned electric and power plants."

Is Congress disqualified to adopt the above act or to levy excise taxes upon the sale by private power companies of electrical energy at wholesale because by the Act of May 18, 1933 (See c. 32, § 1, *et seq.*, 48 Stat. 58, *et seq.*) it created the Tennessee Valley Authority with power to maintain and operate the Muscle Shoals plant and to sell electrical energy at wholesale to states, counties, municipalities and others, to be resold at retail? (c. 32, § 10, 48 Stat. 64). (U. S. C. A., Title 16, §§831, 831i, 1933 Sup.) And are each of the states, counties or cities to which the Authority sells energy for resale at retail disqualified from exercising the police and taxing powers over private competitors? Will this disqualification also extend to the Federal Government's contemplated production and sale of power at the Roosevelt Dam, at the Coulee Dam, at the Bonneville Dam?

Did Congress disable itself from taxing or policing its competitors in the transportation business when it entered the Alaska railway field and the inland

waterways transportation field through the Inland Waterways Corporation? (U. S. C. A., Title 49, §§ 141, 142).

Because a state makes shoes or binder twine or produces farm products in its penal or correctional institutions which it afterwards sells in the open market, is it to be estopped or disqualified to tax or police its competitors because of a supposed inequality under the 14th Amendment?

The ramifications of the doctrine contended for by the appellant here are too complex and too far reaching for adoption by this or any other court in a country which has known discouraging tariffs for private benefit for upwards of an hundred years.

The foregoing considerations and authorities can lead but to the conclusion that the ordinance tax upon the appellant is valid, whether the same exaction is made of the city utility or not.

Second. **The charge that the city, in enforcing the tax against appellant, even though the city meets the tax upon itself, will deny appellant equal protection of the laws, take its property without compensation, and deprive it of its property without due process, is not sensibly founded upon any provision of the ordinance or any fact or circumstance in the record or elsewhere. The charge is supported only by the appellant's expression of fear and apprehension, which cannot avail, for—**

A. Equity does not allay mere fear and apprehension.

B. Conjectural future abuse of the power of taxa-

tion under the provisions of the ordinance is no denial of the existence of the power exerted.

In initiating the argument upon its second proposition, appellant (Br. p. 48) would have this Court believe that the Washington court had decisively disposed of the tax upon city light, and quotes the court:

> "So the problem must be met as though Section 6 had been omitted from the ordinance; as though the city had levied the excise on the appellant and exempted its own light and power business therefrom."

Appellant seems to have forgotten the court's language preceding and following this quotation. It is:

> "* * * The city has not allocated, and *probably cannot allocate*, any of the revenues of its light and power business to the payment of such a tax. Bonds have been issued in excess of $30,000,000 against the revenues from that business; and those bonds are a prior lien on the entire income from it—taking precedence even over operating charges. *Conceding* that the city's light and power revenues could be subjected to the tax, no machinery is set up in the ordinance to accomplish such an end. Furthermore, in making up its budget for 1932, no provision was made for the levy of general taxes (*sic*) to cover the excise provided for in the ordinance."

Here follows the quotation referred to by appellant. The court continues:

> "*Conceding, for the sake of argument*, that to

> be the situation, counsel for the city seek to sustain the tax against appellant under the doctrine that constitutional limitations on the taxing power do not prevent a reasonable classification * * *." (R. 41; 72 Wash. Dec. 521, 522) (Italics ours)

Do the words "probably cannot allocate," "conceding that the city's light and power revenues could be subjected to the tax," and "conceding, for the sake of argument, that to be the situation" even faintly stir conviction in the reader's mind that the court intended to be decisive? Did not the court merely accept the legal conclusions and inferences from partial facts stated in the amended complaint for the purpose of disposing of the demurrer?

In this connection, let us not forget that the court also said:

> "In passing, it is to be noted that the ordinance is a good faith exercise by the city of its power to impose excise taxes for the purpose of raising revenue. Some half(?) dozen businesses enjoying peculiar privileges in and upon the streets of the city are included within its purview. The fact that it imposes a burden upon appellant not borne by the city in its competing business, is an incident and not the purpose of the ordinance." (R. 41)

A. Equity Does Not Allay Mere Fear and Apprehension

"In the first place," says appellant at page 51 of its brief, "the whole theory of a city taxing itself

seems to constitute nothing more than a mental mirage. There is no reality or substance to support the theory." Appellant mistakes reality for mirage. The City can, and may if it so desires, maintain rates sufficient only to pay maintenance and operation (treating the city light tax as an operating charge) and light utility debt service. This course does not appeal to the appellant, for it complains that the City did not increase its rates to meet the tax (R. 10; Complaint, Par. XX). Or the City can, and may if it desires, increase its allowance for operation and maintenance in an amount sufficient to meet the tax and raise its rates. This would find more favor with our adversary. In any event, however accomplished, the City may transfer from the Light Fund to the tax supported General Fund the amount of the tax which, in the absence of the instant ordinance, it is under no obligation to do and which, on the contrary, it is positively restrained from doing (Rem. Rev. Stat., § 9953, later herein quoted from). When it meets this self-imposed obligation, the benefit accrues to the appellant and to other property taxpayers. Is this reality or is it mirage?

"In the second place," forecasts appellant (Br. p. 51), "under the facts of this case there would and could be no actual payment by the city," and then proceeds to describe in detail by what legerdemain the City could and would shear the lamb. By means of ostensible payments for light and power used for street lighting and other general purposes, the City could and would tranfer out of the General Fund back into the City Light Fund an amount equal to

the city light tax. But there are two preventives for such chicanery.

At the commencement of budget making time, on or before July 10th of each year, the heads of all city departments, including utilities, are required, under penalty, to submit to the finance committee of the city council estimates of probable expenses of their several departments for the ensuing year. Such estimates must be made up in form and manner prescribed by the state auditor and be segregated into (a) operating and maintenance expenses and (b) capital or betterment outlays (Rem. Rev. Stat., § 9000-14). Upon the assembling of these estimates, the council must, on or before the first Monday in September, proceed with the consideration thereof "*during which consideration all persons interested shall be given an opportunity for a thorough and complete discussion of the items stated therein.*" After the hearings, the council must "adopt and cause to be *published once each week for two successive weeks a full and complete copy*" of the budget. Before the first Monday in October, the council must further consider the estimates "*at which hearings all persons interested shall be given an opportunity for discussion and suggestions.*" (Rem. Rev. Stat., § 9000-16). At or before said time, the council must finally adopt the budget, after which no changes can be made (Rem. Rev. Stat., §§ 9000-16, 9000-17). Under penalty no officer is permitted to incur any liability for a purpose or beyond that provided in the budget (Rem. Rev. Stat., § 9000-22).

In view of the provision for two public hearings on

the budget and the publication in full thereof in the official newspaper, will any *elective* city council hazard an increase in general tax rates by paying city light more for electrical energy than is reasonable or than it is worth merely for the purpose of causing the tax of the appellant to appear *bona fide?*

The second preventive appears in the act providing for a uniform system of accounts for all public offices (Rem. Rev. Stat., Title 64, Ch. 6). It is therein provided:

> "§ 9953. Separate Accounts for Each Fund. * * * Separate accounts shall be kept for each department, public improvement, undertaking, institution and public service industry under the jurisdiction of every taxing body, and of the state, and all service rendered by, or property transferred from, one department, public improvement, undertaking, institution or public service industry to another, *shall be paid for at its true and full value by* the department, public improvement, undertaking, institution or public service industry receiving the same, and no department, public improvement, undertaking, institution or *public service industry shall benefit in any financial manner* whatever by an appropriation or fund made for the support of another department, public improvement, undertaking, institution or public service industry.'
>
> "§ 9954. Separate Accounts for Public Service Industries. Separate accounts shall be kept for every public service industry which shall show the true and entire cost of the ownership

and operation thereof, the amount collected annually by general or special taxation for service rendered to the public and the amount and character of the service rendered therefor, and the amount collected annually from private users, if any, for service rendered to them, and the amount and character of the service rendered therefor." (Italics ours).

Other provisions of the Act adequately assure obedience (Rem. Rev. Stat., §§ 9955-9958).

How long, under the open methods of doing public business provided by the foregoing statutes, does appellant believe that elective city officers could successfully resort to the legerdemain and chicanery described through the pages of its brief from pages 50 to 55, inclusive, and 63 to 79, inclusive, and all for the intentional injury of the appellant?

The truth is that by reason of the recently adopted limitations upon the power of the state and its agencies to tax property (Ch. 4, Laws of Washington, 1933), and because of the financially weakened condition of the general property taxpayer who hitherto has carried nearly the whole burden of the cost of government, the city authorities were compelled both to reduce expenses and to seek new sources of revenue.

Being limited to the power to license for revenue, the City naturally adopted an occupation or privilege tax to solve its problem. That the ordinance is a good faith exercise of this power was recognized by the Washington court and is apparent upon the face of the ordinance. Some twelve different lines of

business, significantly all conducted in or on public streets without compensation, including its own *water* and *light* utilities, were selected as proper subjects. There is nothing in the record, nor could there be, which even hints at an attempt to use this tax as a club against the appellant or any other taxpayer or to indicate bad faith in any respect.

It is to be presumed that a state in enforcing its local policies will conform its requirements to the Federal guaranties, and any doubt will be resolved in favor of, and not against, the state.

Corporation Commission v. Lowe, 281 U. S. 431, 74 L. ed. 945.

The Washington court characterized the ordinance under review as "a good faith exercise by the city of its power to impose excise taxes for the purpose of raising revenue. * * * The fact that it imposes a burden upon appellant not borne by the city in its competing business, is an incident and not the purpose of the ordinance." (R. 41)

The Los Angeles ordinance considered in *Los Angeles Gas & Electric Co. v. City of Los Angeles*, 241 Fed. 912 (affirmed, 251 U. S. 32), strongly relied upon by the appellant (Br. 55, 56), is in direct contrast with the ordinance at bar. The former was upon its face a direct thrust by purported exercise of the police power against the private power company expressly for the aggrandizement of the City's electric system. It is clear, however, from the decisions in both the District Court and on appeal to this Court that if a real necessity, grounded upon protection of the public peace, health and safety, had

motivated the city council in adopting the ordinance, it would nevertheless have been sustained though it might incidentally have benefited the city enterprise. The case is therefore not an authority in support of the appellant here.

The gist of the appellant's argument in support of its second proposition is nothing other than the expression of fear and apprehension—anxiety over threatened injury without the allegation of a single supporting fact. There is abundant authority that mere apprehension of future injury is insufficient ground for relief by injunction, as also where the injury is doubtful or contingent. There must be a reasonable probability of real injury, in the absence of which injunction will be refused.

Lehmann v. State Board, 263 U. S. 394, 68 L. ed. 354, presents a case where this Court refused to enjoin a state board merely on the ground of supposed wrongful action by it, saying:

> "Official bodies would be of no use as instruments of government if they could be prevented from action by the supposition of wrongful action."

This Court, in *Connecticut v. Massachusetts*, 282 U. S. 660, 75 L. ed. 602, held that—

> "Injunction issues to prevent existing or presently threatened injuries. One will not be granted against something merely feared as liable to occur at some indefinite time in the future."

In *New York v. Illinois*, 274 U. S. 488, 71 L. ed. 1164, this Court said:

> "The suit is one for an injunction, a form of

relief which must rest on an actual or presently threatened interference with the rights of another."

In *New Jersey v. Sargent*, 269 U. S. 328, 70 L. ed. 289, it was held that a mere allegation to enjoin the enforcement of an Act of Congress that a state would be deprived by such enforcement of revenue from leasing of its land was not sufficient to sustain jurisdiction for injunction where no facts were stated showing that the Act was being, or about to be, applied in a way which did or would encroach on or prejudicially affect the state's right.

In *Des Moines v. Des Moines Gas Co.*, 264 Fed. 506 (C. C. A.) this appears:

"The court should not anticipate legislative action and fix its limitations for the future * * *. It cannot be assumed in advance that the city might adopt other ordinances, the enforcement of which would deprive the company of a reasonable return for the employment of its property in the public service."

"Injunctions go only in cases of urgent necessity, so made to appear by competent, material, credible and preponderating evidence to guard against injuries, not merely feared by the applicant but reasonably to be apprehended, and likely to be irreparable."

G. N. Ry. Co. v. Local Great Falls Lodge, etc., 283 Fed. 557.

"Before an injunction can issue against an officer or tribunal for threatened acts alleged

to be injurious, some official steps toward the performance of the act claimed to be injurious must be alleged and shown."

Barber County v. Smith, 48 Kan. 331, 29 Pac. 565;

Seward County v. Stoufer, 47 Kan. 287, 27 Pac. 1000.

See, also:

P. S. P. & L. Co. v. City of Seattle (C. C. A.) 29 Fed. (2d) 254, 257;

City of Seattle v. P. S. P. & L. Co. (C. C. A.) 284 Fed. 659, 662 (Certiorari denied, *P. S. P. & L. Co. v. City of Seattle*, 262 U. S. 743, 67 L. ed. 1210).

14 R. C. L., "Injunctions," § 57;

32 C. J., "Injunctions," § 22.

That the appellant would not be without its remedy in equity if the fears expressed in its brief arrived at the point of reality is manifest from *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220. The court observed:

"Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

See, also:

Bradley v. City of Richmond, 227 U. S. 477, 483, 57 L. ed. 603, 606.

B. Conjectural Future Abuse of the Power of Taxation Under the Provisions of the Ordinance Is No Denial of the Existence of the Power Exerted.

The appellant argues that, under the circumstances of this case, the court should deny to the City Council, under the Fourteenth Amendment, the power to impose a privilege tax upon appellant, either by means of the ordinance at bar or any other ordinance, so long as the City is a competitor, merely because it indulges the prophesy that the Council will abuse the power.

> "The limitation contended for is upon a governmental agency, and restraints upon that must not be readily implied."
>
> Justice McKenna in *City of Joplin v. S.W. Mo. Light Co.*, 191 U. S. 150, 48 L. ed. 127.

Besides, the claim of repugnancy to the Constitution can not be supported by mere speculation or conjecture.

> *Hodge Drive-It-Yourself Co. v. Cincinnati*, 284 U. S. 335, 76 L. ed. 323.

Of possible abuse of the taxing power, this Court many years ago said:

> "Counsel for plaintiff in error contend that if the power of the City of East St. Louis to exact a license fee of $100 from every ferry-boat is conceded, the City could double or treble the fee at will. It is sufficient to say, in reply to this, that it does not follow from the fact that a power is liable to abuse that it does not exist.

If the power is abused, the remedy is with the Legislature."

Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365, 376, 27 L. ed. 419, 424.

"We need not consider whether abuses of the power (to tax) might go to such a point as to transcend it (the Constitution), for we have not such a case before us. The acts (taxing statutes of Alaska) must be judged by their contents, not by the allegations as to their purpose in the complaint."

Holmes, J.—for the court in *Alaska Fish Salt. & B. P. Co. v. Smith*, 255 U. S. 44, 48, 49, 65 L. ed. 489, 495.

Judge Cooley, in his inimitable work entitled "The Law of Taxation," 4th edition, at page 1132 of Volume 2, points out that the liability to abuse or the possibility of the abuse of the taxing power is no denial of the existence of that power.

"Every authority, however indispensable, may be abused, and if it might not, it would be powerless for good."

Kirby v. Shaw, 19 Pa. St. 258, 260;

Ould & Carrington v. Richmond, 23 Gratt. (Va.) 464; 14 Am. Rep. 139.

"It has been strongly urged that this power is peculiarly liable to abuse. It is liable to be abused; perhaps peculiarly so. But so is all government, and all governmental powers. Yet government is nevertheless a necessity among men. It is a very bad government indeed which is not better than the inevitable anarchy and outrage

which follow the absence of all government. And the fact that a power is liable to be abused affords no conclusive argument against it."

Reeves v. Wood County Treasurer, 8 Ohio St. 333.

Suggestion is made that the provisions in Section 16 (R. 23) of the ordinance conferring power upon the City Comptroller to inspect appellant's books and records constitute an unlawful invasion of its privacy. However, the right to impose taxes carries with it the power to make reasonable regulations for collection.

Yu Cong Eng v. Trinidad, 271 U.S. 500, 525, 70 L. ed. 1059, 1069;

Wingfield v. So. Car. Tax Com., 147 So. Car. 116, 144 S. E. 846;

Howe v. Barto, 12 Wash. 627.

Further suggestion is made, we presume in view of the right of a taxpayer to appeal to the City Council, that the City will act as witness, prosecutor, judge, jury and executioner to the eventual elimination of appellant. But the presumptions that the City will not act fairly and impartially are all the other way.

Home Telph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 279, 53 L. ed. 176, 185.

Third. **The ordinance requirement that appellant secure an occupation license as a condition to its continuance in the pursuit of its business in the city does not impair any obligation of its franchise contract.**

A. The ordinance does not penalize the failure to

obtain the license except as a mode of collecting the tax and is therefore not an unlawful interference with the contract;

B. Appellant's franchise is not a license of such character as authorizes it to carry on the light and power business in the City nor an exemption from license or occupation taxation;

C. In any event, the City never had, nor has it, any authority to contract away its power of taxation.

A. THE ORDINANCE DOES NOT PENALIZE THE FAILURE TO OBTAIN THE LICENSE EXCEPT AS A MODE OF COLLECTING THE TAX AND IS THEREFORE NOT AN UNLAWFUL INTERFERENCE WITH THE CONTRACT.

In the first place, if the appellant's franchise be considered a license from the City to engage in the light and power business in the City, the revenue license required by the ordinance is not of such a character as to interfere with, or destroy, the franchise license. This has been made plain by prior decisions of this Court.

We refer first to the case of *Royall v. Virginia*, 116 U. S. 572, 29 L. ed. 735, decided in 1886. Under the laws of Virginia, no person could without a license practice as an attorney and every attorney at law, in addition to being incensed, sworn and admitted to the bar, was required as a condition precedent to obtain a revenue license. The State had issued certain bonds with coupons attached under the provisions

of an act which provided that the bonds and coupons should be received in payment of taxes, debts, dues and demands due the State. Royall tendered some of the coupons in payment of the revenue license and was refused. In arriving at the conclusion that the license was a tax payable in the tendered coupons, this Court said:

> "The payment required as a preliminary to the license is in the nature and form of a tax, and is a due to the state which it may demand and exact from every one of its citizens who either will or must follow some business avocation within its limits, to the pursuit of which the assessment is made a condition precedent. It is an occupation tax, for which the license is merely a receipt and not an authority, except in that sense, because it is laid and collected as revenue, and not merely as incident to the general police power of the state, etc. * * *.
>
> "That the party complying with the statutory conditions is entitled as of right to the license, is conclusive that the payment is a tax laid for revenue and not an exaction for purposes of regulation. (Citing cases). The occupation, which is the subject of the license, is lawful in itself, and is only prohibited for the purpose of the license; that is to say, prohibited in order to compel the taking out of a license, and the license is required only as a convenient method of assessing and collecting the tax." (Citing authorities).

Identical views respecting the character of revenue licenses were expressed in *Home Insurance Co.*

v. Augusta, 93 U. S. 116, 23 L. ed. 825, and License Tax Cases, 5 Wall. 462, 18 L. ed. 497.

The character of the license at bar was found by the Washington Supreme Court to be the same as those in the foregoing cases (R. 51).

Pacific Tel. & Tel. Co. v. Seattle, 72 Wash. Dec. 503, 506 (R. 48).

In *Postal Tel. & Cable Co. v. Charleston*, 153 U. S. 692, 38 L. ed. 871, this Court held that the payment of revenue license exacted as a condition precedent to continuance in business in the City, did not interfere with the right or franchise of telegraph companies under acts of Congress to construct and operate lines along post roads under the Post Roads Act of 1866.

> "That this license," said Justice Shiras, "is not a condition upon which the right to do business depends, but is a tax, is shown by the case of *Home Insurance Co. v. Augusta*, 93 U. S. 122."

Refer also to:

Williams v. Talladega, 226 U. S. 404, 57 L. ed. 275, 280.

Judge Cooley says:

> "When the tax takes the form of a tax on the privilege of following an employment, convenience in collection will commonly dictate the requirement of a license, and the person taxed will be compelled to pay the tax as a condition to the right to carry on the business at all."
>
> Cooley on Taxation, 4th edition, par. 1716.

B. APPELLANT'S FRANCHISE IS NEITHER A LICENSE OF SUCH CHARACTER AS AUTHORIZES IT TO CARRY ON THE LIGHT AND POWER BUSINESS IN THE CITY NOR AN EXEMPTION FROM LICENSE OR OCCUPATION TAXATION.

The point is made by appellant beginning at page 80 of its brief that its franchise is a license to carry on its business which is impaired or destroyed by the ordinance requirement of a revenue license.

The granting clause of its franchise reads as follows:

> "That there be and hereby is granted to S. L. Shuffleton, his successors and assigns (appellant is his assignee) the right, authority and franchise, on the conditions and for the considerations in this ordinance expressed, to construct, maintain and operate equipment and apparatus for an underground electric system, and to erect and maintain poles, wires and appurtenances for the distribution of electric light, heat and power in, over and under the streets, alleys and public places of the City of Seattle. This right, authority and franchise is intended to apply to all streets, alleys and public places of said city, now or hereafter existing, subject to the terms and conditions hereinafter expressed; and said grantee, his successors and assigns, by accepting this ordinance, covenant that within three years from the approval of this ordinance he or they will have in operation a system extending to all

streets and parts of streets now lighted by electricity." (Appellant's Br., p. 82)

The ordinance contains no agreement on the part of the grantee to pay anything for the privileges granted. No obligation to render service to the public is expressly stipulated. No agreement concerning rates appears. There is an entire absence of any agreement looking to the exemption of the grantee, or successors, from taxation of any kind. If there is such exemption, appellant has failed to point it out.

Exactly the same point was raised in *Memphis Gas-Light Co. v. Taxing District of Shelby County*, 109 U. S. 398, 27 L. ed. 976. There, the State had granted plaintiff in error an operating franchise for the establishment and operation of gas works in the City of Nashville. Afterwards the Taxing District by authority of a State law and as a condition precedent to the continuance of plaintiff's business, exacted of it a license tax under criminal penalty for failure to pay the same. The following quotation at p. 400 (109 U. S.) puts the question and furnishes the answer:

> "The argument of counsel is that if no express contract against taxation can be found here it must be implied, because to permit the state to tax this company by a license tax for the privilege granted by its charter, is to destroy that privilege.
>
> "But the answer is, that the company took its charter subject to the same right of taxation in the state that applies to all other privileges and to all other property. If it wished or intended

to have an exemption of any kind from taxation, or felt that it was necessary to the profitable working of its business, it should have required a provision to that effect in its charter.

"The Constitution of the United States does not profess in all cases to protect property from unjust or oppressive taxation by the states. That is left to the state constitution and state laws."

Again, the decision of this Court in *St. Louis v. United Railways Co.*, 210 U. S. 266, 52 L. ed. 1054, cited and quoted from by the Washington court (R. 40), is decisive against appellant. That case proceeded in part upon the principle that a franchise or right to occupy the streets of a city is not identical with the business or occupation of the grantee, and in part upon the principle that exemption from taxation must clearly and expressly appear; any doubt of exemption being fatal to the claim.

See also:

Nebraska Tel. Co. v. Lincoln, 82 Neb. 59, 117 N. W. 284.

C. In Any Event, the City Never Had, Nor Has It, Any Authority to Contract Away Its Power of Taxation.

The appellant has not, and can not, point to any provision of the Washington Constitution, legislative enactments or the City Charter conferring upon the City authority to contract away its power of taxation. Indeed, the public policy of the State is the

other way. The Washington Constitution, Article VII, Section 4, contains the following:

> "The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the State shall be a party."

The Washington court in *Pacific Telephone & Telegraph Co. v. Everett*, 97 Wash. 259, made the following pointed comment at page 269:

> "While it (The City of Everett) may not surrender the right of regulation necessary to the public health and safety, or the *general taxing power* (Const., Art. 7, §4), it can make a valid and binding contract concerning the terms upon which the grantee may make use of public places; such a contract as cannot be changed or altered at the will of the city without the consent of the other party thereto."

Lacking power to grant such exemption, any contract purporting to do so would be void.

> *McTwiggan v. Hunter*, 19 R. I. 265, 33 Atl. 5.

Fourth. **The ordinance definition of "gross income" as applied to the appellant is neither in fact nor in law vague, indefinite or uncertain.**

Since "the province of construction lies wholly within the domain of ambiguity" (*Hamilton v. Rathbone*, 175 U. S. 414, 44 L. ed. 219), the Washington Supreme court approved the definition without construction. The question then comes to this Court

without the benefit of state construction, if any construction be necessary.

This Court has marked the lines of its judicial duty in such circumstances.

> "So far as statutes fairly may be construed in such a way as to avoid doubtful constitutional questions they should be so construed (*United States ex rel. Atty. Gen. v. Delaware & H. Co.*, 213 U. S. 366, 407, 408, 53 L. ed. 836, 848, 849, 29 Sup. Ct. Rep. 527); and it is to be presumed that state laws will be construed in that way by the state courts."
>
> *Fox v. Washington*, 236 U. S. 273, 277, 59 L. ed. 573, 575.

> "If the state court has not otherwise construed it, and it is susceptible of an interpretation which conforms to constitutional requirements, doubts must be resolved in favor of, and not against, the state."
>
> *Toombs v. Citizens Bank*, 281 U. S. 643, 647, 74 L. ed. 1088, 1090.

Where a state statute is susceptible of a construction which will render it constitutional, all doubt is resolved in favor of its constitutionality in the absence of any construction by the state court.

> *South Utah M. & S. v. Beaver County*, 262 U. S. 325, 331, 67 L. ed. 1004, 1008.

In the absence of applicable state decisions, this tribunal will be guided by generally accepted principles of construction which have been recognized and acted upon by this Court.

Pacific Company v. Johnson, 285 U.S. 480, 489, 76 L. ed. 893, 896.

"The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."

Hooper v. California, 155 U. S. 648, 657, 39 L. ed. 297, 301.

The courts may resolve to clearness a vague statute imposing a license tax.

Southeastern Express Co. v. Moler, 264 U. S. 535, 539, 68 L. ed. 836, 839.

This court has also set the limits of constitutional attacks upon state legislation.

A litigant can not invoke a constitutional objection to a part of a statute not applicable to his own particular case.

Southern R. Co. v. King, 217 U. S. 524; 54 L. ed. 868;

Engel v. O'Malley, 219 U. S. 128; 55 L. ed. 128;

Standard Stock Food Co. v. Wright, 225 U. S. 540; 56 L. ed. 1197;

Rosenthall v. People, 226 U. S. 260; 57 L. ed. 212;

Darnell v. Indiana, 226 U. S. 390, 57 L. ed. 267.

Unless a litigant's rights are directly involved, the court will postpone inquiry into constitutional questions which are separable therefrom until they are met upon a question directly at issue unless the unconstitutional feature of it, if it exists, is of such a character as to render the entire act void.

New York C. & H. R. R. Co. v. U. S., 212 U. S. 481, 53 L. ed. 613.

"A law can not be declared invalid at the instance of one not affected by it."

Williams v. Walsh, 222 U. S. 415, 423, 56 L. ed. 253, 256.

The objection that a statute is too vague to be valid is available only to one whom it concerns.

U. S. v. Wurzbach, 280 U. S. 396, 74 L. ed. 508.

"In assailing the constitutionality of a state statute, the burden rests upon appellant to establish that it infringes the constitutional guaranty which he invokes."

Toombs v. Citizens Bank, supra.

"A litigant can be heard to question a statute's validity only when, and so far as, it is being or is about to be applied to his disadvantage."

Utah Pr. & Light Co. v. Pfost, 286 U. S. 165, 186, 76 L. ed. 1038, 1049.

A statute can not be held void for uncertainty if any practical or sensible or reasonable construction can be given it. Mere difficulty in ascertaining its meaning or the fact that it is susceptible to interpretation will not render it nugatory. Mere difficulty in construction does not justify courts in disregarding it, and it is their duty to endeavor by every rule of construction to ascertain the meaning of, and give full force and effect to, every enactment of the legislature not obnoxious to constitutional prohibitions.

State ex rel. Crow v. Westside R. Co., 146 Mo. 155, 47 S. W. 959;

Adams v. Greene, 182 Ky. 504, 206 S. W. 759;

State v. Livingston Concrete B. & M. Co., 34 Mont. 570, 87 Pac. 980;

State ex rel. Forchheimer v. LeBlond, 108 Ohio St. 41, 140 N. E. 491;

State v. Dvoracek, 140 Iowa 266, 118 N. W. 399;

Coggins v. Ely, 23 Ariz. 155, 202 Pac. 391;

Pacific Coast Dairy v. Police Ct. of San Francisco, 214 Cal. 668, 8 Pac. (2d) 140, 80 A. L. R. 1217.

"Revenue laws are not penal laws in the sense that requires them to be construed with great strictness in favor of the defendant. They are rather to be regarded as remedial in their character, and intended to prevent fraud, suppress public wrong and promote the public good. They should be so construed as to carry out the intention of the legislature in passing them, and most effectually accomplish these objects."

Cliquot v. U. S., 70 U. S. 114, 145, 18 L. ed. 116, 121;

Royall v. Virginia, 116 U. S. 572, 583, 29 L. ed. 735, 738.

"The intention (of the legislature to tax) being plain, the inartificiality of the law should not result in its overthrow."

Alaska Mex. Gold Min. Co. v. Terr. of Alaska (C. C. A.) 236 Fed. 64, 69—citing *Johnson v. So. Pac. Co.*, 196 U. S. 1, 49 L. ed. 363;

U. S. v. Stowell, 133 U. S. 1, 33 L. ed. 555;
Cliquot v. U. S., 3 Wall. (70 U. S.) 114,
18 L. ed. 116.

With the foregoing principles in mind, we now turn to the criticized portion of the ordinance, the pertinent provisions of which are:

"Section 2. *Definitions*: In construing the provisions of this ordinance, save when otherwise plainly declared or clearly apparent from the context, the following definitions shall be applied:

"GROSS INCOME: The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not)* by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness, or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses." (R. 18)

"Section 5. *Occupations Subject to Tax*—

*(In the record a comma has been erroneously inserted immediately following the first parenthetical matter appearing in the definition of gross income. This comma does not appear in the original ordinance or in the copy thereof attached to the original of appellant's amended complaint).

Amounts: There are hereby levied and shall be collected annual license fees or occupation taxes against the persons on account of the business activities, and in the amounts to be determined by the application of the rates against gross income, as follows:

* * * * * * * * *

"(c) Upon every person engaged in or carrying on the business of selling or furnishing electric light and power, a fee or tax equal to three per cent (3%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than Two Hundred Fifty ($250.00) Dollars per tax year. * * *"

"Gross income," as above delimited, was borrowed with some change from Section 959, West Virginia Code, 1932. The Act in which it appears has been in force there for many years, and has twice been before this Court.

Hope Natural Gas Co. v. Hall, 102 W. Va. 272, 274 U. S. 284 (Upholding tax on gross income of a natural gas company);
United Fuel Gas Co. v. Hallanan, 87 W. Va. 396, 257 U. S. 277.

In neither case was the definition criticized or in issue.

Substantially similar definitions have found favor in legislative halls of the States of Mississippi (Emergency Rev. Act of 1932) and Washington (Session Laws, 1933, Ch. 191, Sec. 1, Subd. (6)).

In Paragraph I of the amended complaint, appellant alleges:

> "* * * that plaintiff as such corporation has been and is now engaged in the business of selling and furnishing electric light and power to the public for hire in the City of Seattle and the State of Washington * * *." (R. 1)

Appellant also says:

> "* * * Appellant, as a public utility corporation, has been and now is actively engaged in the business of selling and furnishing electric light and power, within the definition thereof contained in the foregoing ordinance * * *." (Br. 12).

Since the appellant is engaged in the business of selling light and power, that is, electrical energy for light and power purposes, it is concerned only with that portion of the definition quoted as follows:

> "GROSS INCOME: The value proceeding or accruing from the sale of tangible property * * * without any deduction on account of the cost of the property sold; the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses."

It is not satisfied with the use of the word "value," contending that it is a word of indefinite meaning; that it may mean "cost price," "sale price" or "net profit" (Br. 88). A gem from the pen of the beloved and respected Mr. Justice Holmes is helpful at this point:

> "A word is not a crystal, transparent and un-

changed; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."

Towne v. Eisner, 245 U. S. 418, 425, 62 L. ed. 372, 376.

And so the word "value" may and sometimes does mean "price," depending upon the connection in which it is used. "Price" is a synonym. *S. E. Exp. v. Nightingale*, 33 Ga. 515, 126 S. E. 915. "Value" is the first meaning ascribed to the word "price" in Webster's New International Dictionary (1931). From Funk and Wagnall's New Standard Dictionary of the English Language (1925) we learn that, in political economy, value, in a restricted sense, is market price. In The New Century Dictionary (1927) we find that value is the worth of a thing, measured by the amount of other things for which it can be exchanged, or as estimated in terms of a medium of exchange. George Crabb, in his "English Synonyms Explained," page 756, says that price is the measure of the value received from a sale; it is the measure of value or worth.

Justice Holmes, in *Int. Harv. Co. v. Ky.*, 234 U. S. 216, 222, 58 L. ed. 1284, 1287, defines value thus:

"Value is the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator. It is a fact, and generally is more or less easy to ascertain."

The "price," the "common denominator," received by the appellant is, therefore, the "value" which proceeds or accrues to it from the sale of its property. In

its case the common denominator, the price, is fixed by law.

Under Rem. Rev. Stat., § 10363, every electrical company is required to file with the Washington Department of Public Works (the regulatory body) and to keep open to public inspection, its schedule of rates and charges for its product or service. The rates so fixed are subject to change by action of the Department upon order after hearing upon its own motion or upon complaint. By the provisions of Rem. Rev. Stat., § 10365, the Company is forbidden under penalty to charge, demand, collect or receive a greater or less or different compensation for any service rendered than the rates and charges specified in the schedule or as changed by the Commission (R. 2, Complaint IV) (*Idem*, §10443, §10444).

It results, then, that the value proceeding or accruing to the appellant from the sale of its property, electrical energy, is the ascertained and fixed rate or price which it receives from the consumer and can be nothing else. The value of its service is well defined by law.

Again, the word "value" is inseparably connected with the word "sale." "Value" must accrue from "sale" of property. In the popular mind, and in law, "sale" means "a transmutation of property from one man to another in consideration of some price" (2 Bl. 446).

> "To constitute a valid sale there must be (1) parties competent to contract; (2) mutual assent; (3) a thing, the absolute or general property in which is transferred from the seller to the

buyer; (4) *a price in money*, paid or promised." (Italics ours) Benj. Sales, pp. 1 and 2.

A sale is "competent parties to enter into a contract, an agreement to sell, the mutual assent of the parties to the subject matter of the sale, and the price to be paid therefor." *Gardner v. Lane*, 12 Allen, 39, 43. The foregoing definitions were taken from *Butler v. Thompson*, 92 U. S. 412, 414, 23 L. ed. 684, 685.

> "A sale, *ex vi termini*, is a transfer of property from one man to another. It is a contract to pass rights of property *for money*." (Italics ours).
>
> *Turner v. Ogden*, 1 Black (66 U. S.) 450, 456; 17 L. ed. 203, 205.

> "* * * 'sale' is a word of precise legal import, both at law and in equity. It means, at all times, a contract between parties, to give and to pass rights of property *for money—which the buyer pays or promises to pay* to the seller for the thing bought and sold." (Italics ours)
>
> *Williamson, et al. v. Berry*, 8 How. 495, 544, 12 L. ed. 1170, 1191.

Electrical energy is property. *Utah Pr. & Lt. Co. v. Pfost*, 286 U. S. 165, 180, 76 L. ed. 1038, 1046. The value, therefore, which proceeds or accrues to the appellant from the transfer of that property is a definite sum of *money*.

Appellant complains, however, that the value which accrues to it may, within the meaning of the definition, be its "net profit" rather than the gross amount received. From what has gone above, and also from the last clause of the definition of gross income, dis-

allowing deductions for costs or expenses of any kind, it is plain that "value" means the gross receipts.

The word value was used looking to the time when businesses wholly or partly engaged in barter or exchange might be brought under the terms of the ordinance by amendment. When that time comes, provision will be made for determining "value" accruing from barter or exchange.

Notwithstanding that the portion of the definition last quoted clearly suffices to cover appellant's situation, it endeavors to have applied to itself the following portion:

> "and receipts (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages or other evidences of indebtedness, or stocks and the like)."

Obviously this portion is intended as an omnibus to cover receipts by any name derived from any transaction not included in or covered by the words "the value proceeding or accruing from the sale of tangible property or service." It covers and includes rentals from leased chattels, receipts in the form of royalties, fees or other emoluments, or arising out of the investment of capital in the business engaged in.

While sharply criticizing the use of the words "receipts * * * by reason of the investment of capital in

the business engaged in," the appellant does not allege, nor can it point to anything in the record or as matter of judicial notice, that in the business of selling electrical energy for light and power purposes it receives any *receipts* other than the value or price it receives from the sale of energy. It is not alleged or shown that it receives rentals, royalties, fees or other emoluments.

Appellant says further that a portion of its receipts is due to the use of real estate; that it has equipment of the value of millions of dollars housed in, and to a large part permanently affixed to buildings which are a part of the realty.

> "Who can determine the proportion of the receipts from any electric light and power business which are not attributable to the use of real property? * * * How is the taxpayer to know? How may the amount be determined?" (Br. 89).

Of course if an unascertainable portion of its receipts is due to the use of its property in the business, still that portion is simply a return to it of part of the cost of production. The use of its real estate is as much an element in its production costs as is the purchase of materials, labor expenses and other items. It receives no receipts for the use of real estate as such. Receipts from its customers arise or accrue *from the sale* of electrical energy, which after all is the only matter of concern to the public. There is no allegation or showing that the appellant has leased or rented any of its real property or granted an easement or license therein.

If the portion of the definition commencing with the

words "and receipts" and ending with the words "however designated" is vague, indefinite or uncertain, it is of no moment to the appellant, for as to that it is mere surplusage, and if invalid affords appellant, within the rules above stated, no ground for complaint.

If the parenthetical matter: "(excluding receipts or proceeds from the use or sale of real property or any interest therein, * * *)" is so vague, indefinite or uncertain that its meaning can not be reasonably fathomed, that is of no avail to appellant, even though applicable to its situation.

In a case of somewhat similar circumstances, this court in *Utah Pr. & Light Co. v. Pfost*, 286 U. S. 165, 185, 76 L. ed. 1038, 1048, pointed out:

> "The primary object of the statute under review, plainly, is to raise revenue. The exemption made by § 5 and the provisions for carrying that exemption into effect are secondary. We find no warant for concluding that the legislature would have been content to sacrifice an important revenue statute in the event that relief from its burdens in respect of particular individuals should become ineffective. On the contrary, it seems entirely reasonable to suppose that if the legislature had expressed itself specifically in respect of the matter, it would have declared that the tax, being the vital aim of the act, was to be preserved even though the specified exemptions should fall for lack of validity." (Citing cases)

This pronouncement was made upon a statute which

contained a provision saving the remainder of the act from any adjudication of invalidity of a part thereof. The ordinance at bar contains the following:

> "Section 23. *Effect of Partial Invalidity*: If any provision or section of this ordinance shall be held void or unconstitutional, all other parts, provisions and sections of this ordinance not expressly so held to be void or unconstitutional shall continue in full force and effect." (R. 26)

Appellant is exercised over the penalties for disobedience, and states that it must *guess* at "gross income" at the risk of incurring heavy fine and imprisonment (Br. 91). Undue alarm is expressed, for it appears in Section 22 of the ordinance that "It shall be unlawful * * * for any person to make any *false* or fraudulent application or return or any *false* statement or representation in, or in connection with, any such application or return, or to aid or abet another in any attempt to *evade* payment of the fee or tax, or any part thereof, * * * or to testify *falsely* upon any investigation of the correctness of a return, or upon the hearing of any appeal, * * *." (R. 25). No citation of authority is needed to show that mere mistake is not a violation; that there must be an intentional falsity, since the word "false" and the word "fraud" both imply intent, or at the very least, gross negligence.

If courts should insist upon the absolute in the phrasing of revenue measures, we venture to say that neither the United States, the States, nor any other taxing unit could survive. Mr. Justice Sutherland

remarked in the *Pfost* case, *supra*, at p. 190 (286 U. S.):

> "If, for example, absolute exactness of determination in respect of net income, deductions, valuation, losses, obsolescence, depreciation, etc., were required in cases arising under the federal income tax law, it is safe to say that the revenue from that source would be much curtailed. The law, which is said not to require impossibilities, must be satisfied, in many of its applications, with fair and reasonable approximations."

We point out that appellant was courageous enough to take the risk of making its first report or return of gross income to the City Comptroller on July 1, 1932, when, under written protest, it applied for a license, made a return of its gross income and paid the first monthly installment of its tax in the sum of $9697.75, computed upon the gross income reported, at the tax rate provided (R. 8, 27). According to the amended complaint the City did not dispute the amount of gross income returned, but to the contrary asserted a claim to further monthly installments of the tax in like amount (R. 16).

So. Realty Corp. v. McCallum, 65 Fed. (2d) 934, 938.

We expect to file briefs in the related cases, *The Pacific Tel. & Tel. Co. v. City of Seattle*, No. 364, October Term, 1933, and *Seattle Gas Co. v. City of Seattle*, No. 359, said term. If permissible in this court, we desire that any applicable new matter presented

therein should be considered in determining this cause.

For the reasons herein pressed upon the Court, the judgment of the Supreme Court of the State of Washington ought to be affirmed.

Respectfully submitted,

A. C. VAN SOELEN,
Corporation Counsel.

WALTER L. BAUMGARTNER,
Assistant.

C. V. HOARD,
Counsel for Appellee.

515 County-City Building,
Seattle, Washington.
December, 1933.

APPENDIX A

ORDINANCE No. 62662
(Council Bill 53240)

AN ORDINANCE relating to, and providing for, a license or occupation tax upon certain businesses, occupations, pursuits and privileges; defining offenses and providing penalties.

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. *Exercise of Revenue License Power:* The provisions of this ordinance shall be deemed an exercise of the power of the City of Seattle to license for revenue:

Section 2. *Definitions*: In construing the provisions of this ordinance, save when otherwise plainly declared or clearly apparent from the context, the following definitions shall be applied:

Gross Income: The value proceeding or accruing from the sale of tangible property or service, and receipts (including all sums earned or charged, whether received or not) by reason of the investment of capital in the business engaged in, including rentals, royalties, fees or other emoluments, however designated (excluding receipts or proceeds from the use or sale of real property or any interest therein, and proceeds from the sale of notes, bonds, mortgages, or other evidences of indebtedness, or stocks and the like) and without any deduction on account of the cost of the property sold, the cost of materials used, labor costs, interest or discount paid, or any expense whatsoever, and without any deduction on account of losses.

Person or Persons: Persons of either sex, firms, co-partnerships, corporations and other associations of natural persons, whether acting by themselves or by servants, agents or employes.

Taxpayer: Any person liable to the license fee or tax imposed by this ordinance.

Tax Year or Taxable Year: The year commencing March 1st and ending on the last day of February of the following year, or, in lieu thereof, the taxpayer's fiscal year when permission is obtained from the City Comptroller to use the same as the tax period.

Section 3. *"Occupation License" Required*: After the 1st day of July, 1932, no person shall engage in or carry on any business, occupation, pursuit or privilege for which a license fee or tax is imposed by this ordinance without having first obtained, and being the holder of, a valid and subsisting license so to do, to be known as an "Occupation License."

Any person engaging in, or carrying on, more than one such business, occupation, pursuit or privilege shall pay the license tax so imposed upon each of the same.

Any taxpayer who engages in, or carries on, any business subject to tax hereunder without having his "Occupation License" so to do, shall be guilty of a violation of this ordinance for each day during which the business is so engaged in or carried on, and any taxpayer who fails or refuses to pay the license fee or tax or any part thereof on or before the due date shall be deemed to be operating without having his license so to do.

Section 4. *License Tax Year*: All "Occupation

Licenses" shall be for the tax year for which issued and shall expire at the end of such tax year.

Such "Occupation License" and the fee or tax therefor hereby imposed shall be for the year commencing March 1st and ending on the last day of February of the following year; Provided, however, that if the taxpayer in transacting his business keeps the books reflecting the same for a fiscal year not based on the calendar year, he may, with the assent of the City Comptroller, obtain his license for the period of his current fiscal year which shall be deemed his tax year, and pay the fee or tax computed upon his gross income made during his fiscal year (next preceding his tax year) covering his accounting period as shown by the method of keeping the books of the business.

Section 5. *Occupations Subject to Tax—Amount*: There are hereby levied and shall be collected annual license fees or occupation taxes against the persons on account of the business activities, and in the amounts to be determined by the application of the rates against gross income, as follows:

(a) Upon every person engaged in or carrying on a telegraph and/or telephone business, a fee or tax equal to four per cent (4%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than One Thousand ($1,000.00) Dollars per tax year.

(b) Upon every person engaged in or carrying on the business of selling or furnishing gas and/or water

for hire, a fee or tax equal to three per cent (3%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than One Thousand ($1,000.00) Dollars per tax year.

(c) Upon every person engaged in or carrying on the business of selling or furnishing electric light and power, a fee or tax equal to three per cent (3%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than Two Hundred Fifty ($250.00) Dollars per tax year.

(d) Upon every person conducting or engaged in the business of supplying steam heat or power to the public for hire, a fee or tax equal to four per cent (4%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than Fifty ($50.00) Dollars per tax year.

(e) Upon every person engaged in the business of operating or conducting a fire alarm system, district telegraph or burglary and police alarm system for hire, a fee or tax equal to two per cent (2%) of the total gross income from such business in the City during his fiscal year next preceding the tax year for which the license is required; provided, however, that the minimum fee or tax shall not be less than One Hundred ($100.00) Dollars per tax year.

Section 6. *City of Seattle Subject to Tax*: Sub-

divisions (b) and (c) of Section 5 shall, as far as permitted by law, be applicable to the City of Seattle, except that said City shall not, as a taxpayer, be required to conform to the other provisions of this ordinance.

Section 7. *Occupations and Privileges Subject to Tax Amount*: There are hereby levied, and shall be collected, annual license fees or occupation taxes against the persons on account of the business activities or privileges and in the amounts hereinafter fixed, as follows:

(a) Upon every person engaged in or carrying on the business of operating any motor vehicle for the transportation of passengers for hire at rates per trip or based on the distance and/or time employed, and driven by the owner or his representative under the routing or direction of the passenger or person hiring the same, the following tax or fee:

When such vehicle does not stand in or upon any public street, alley or other public place, or upon any place open to the public for the use of vehicles while awaiting employment:

For each such vehicle having a seating capacity of seven (7) persons, or less, Fifteen ($15.00) Dollars per tax year;

For each such vehicle having a seating capacity of eight (8) to ten (10) persons, inclusive, Twenty ($20.00) Dollars per tax year;

For each such vehicle having a seating capacity of eleven (11) to fifteen (15) persons, inclusive, Thirty-six ($36.00) Dollars per tax year;

For each such vehicle having a seating capacity of

sixteen (16) to twenty (20) persons, inclusive, Fifty-four ($54.00) Dollars per tax year;

For each such vehicle having a seating capacity of more than twenty (20) persons, Seventy-two ($72.00) Dollars per tax year.

When such vehicle stands in or upon any public street, alley or other public place, or any place open to the public for the use of vehicles while awaiting employment:

For each such vehicle having a seating capacity of seven (7) persons, or less, Thirty ($30.00) Dollars per tax year;

For each such vehicle having a seating capacity of eight (8) to ten (10) persons, inclusive, Thirty-six ($36.00) Dollars per tax year;

For each such vehicle having a seating capacity of eleven (11) to fifteen (15) persons, inclusive, forty ($40.00) Dollars per tax year;

For each such vehicle having a seating capacity of sixteen (16) to twenty (20) persons, inclusive, Fifty-four ($54.00) Dollars per tax year;

For each such vehicle having a seating capacity of more than twenty (20) persons, inclusive, Seventy-two ($72.00) Dollars per tax year.

In determining the seating capacity of any such vehicle the driver and conductor shall be included.

(b) Upon every person engaged in or carrying on the business of operating any motor vehicle over the public streets for the purpose of sight-seeing or showing points of interest, and not elsewhere herein mentioned and licensed, a fee or tax in the same amount

as required for the business of operating the vehicles mentioned in Sub-Section (a) of this section, provided, however, that the vehicles mentioned in this subsection may be operated by the licensee at rates based on time employed, whether for sight-seeing purposes or not (known as "for hire" service) without securing in addition the license required by said Sub-Section (a).

In determining the seating capacity of any such sight-seeing vehicle the driver and announcer shall be included.

(c) Upon every person engaged in or carrying on the business of operating any motor vehicle over the public streets for the transportation of passengers for hire between common carrier passenger terminals or depots and hotels, and not elsewhere herein mentioned and licensed, for each vehicle Sixty ($60.00) Dollars per tax year.

(d) Upon every person engaged in or carrying on the business of letting the use of any motor vehicle at rates per trip, or based on distance travelled, or time employed, and to be driven and routed or directed by the person or persons hiring or renting the same, the following tax or fee:

For each such vehicle which does not stand in or upon any public street, alley or other public place, or any place open to the public for the use of vehicles while awaiting employment, Fifteen ($15.00) Dollars per tax year;

For each such vehicle standing in or upon any public street, alley or other public place, or any place open to the use of the public for vehicles while await-

ing employment, Thirty ($30.00) Dollars per tax year.

(e) Upon every person engaged in or carrying on the business of operating any vehicle drawn by or attached to any motor driven vehicle and used for the transportation of baggage, express, freight, household goods, merchandise or materials for hire, and which vehicle receives or discharges baggage, express, freight, household goods, merchandise or other materials at points within or without the City, and which does not operate over a defined route:

For each such vehicle of not more than 1 ton capacity, $3.00 per tax year.

For each such vehicle of not more than 2 tons capacity, $6.00 per tax year.

For each such vehicle of not more than 3 tons capacity, $9.00 per tax year.

For each such vehicle of not more than 4 tons capacity, $12.00 per tax year.

For each such vehicle of not more than 5 tons capacity, $15.00 per tax year.

For each such vehicle of not more than 6 tons capacity, $18.00 per tax year.

For each such vehicle of more than 6 tons capacity, $21.00 per tax year.

No license required by this ordinance for the operation of any vehicle shall be issued unless the licenses and/or permits therefor required by law or ordinances other than this have been granted.

Section 8. *Tax Apportioned for Year 1932*: For the remainder of the tax year 1932, ending on the last day of February, 1933, the fees or taxes herein

imposed shall be apportioned in the ratio of said remainder to a full tax year.

Section 9. *Exceptions and Deductions*: There shall be excepted and deducted from the total gross income upon which the license fee or tax is computed so much thereof as is derived from transactions in interstate or foreign commerce, or from business done for the government of the United States, its officers or agents, and any amount paid by the taxpayer to the United States, the State of Washington, or the City of Seattle, as excise taxes levied or imposed upon the sale or distribution of property or services.

Nothing in this ordinance shall be construed as requiring a license, or the payment of a license fee or tax, or the doing of any act, which would constitute an unlawful burden or interference in violation of the Constitution or laws of the United States, or which would not be consistent with the Constitution or laws of the State of Washington.

Any person subject to the payment of a license fee or tax under the provisions of any ordinance of the City, other than this, on account of engaging in any activity for which he is liable to tax hereunder, may deduct the amount of such fee or tax from the amount of fee or tax imposed by this ordinance on account of such activity, but such person shall nevertheless, in the manner herein provided for, apply for and procure an "Occupation License."

Section 10. *Application or Return for License*: On or before the 1st day of July, 1932, and thereafter on or before the first day of each tax year, every taxpayer shall apply to the City Comptroller for an "Oc-

cupation License" upon blanks or forms of return to be prepared and provided by him requesting such information as may be necessary to enable him to arrive at the lawful amount of the fee or tax. The taxpayer shall, in a legible manner, write in such blank or form of return the information required and shall sign the same and by affidavit at the foot thereof shall swear or affirm that the information therein given is full and true and that he knows the same to be so.

Every such application or return shall be accompanied by a remittance by bank draft, certified check, cashier's check or money order, payable to the City Treasurer, or in cash, in the amount of the tax or fee or installment thereof required by the provisions hereof.

If the applicant be a partnership, the application or return must be made by one of the partners; if a corporation, by one of the officers thereof; if a foreign corporation, co-partnership or non-resident individual, by the resident agent or local manager of said corporation, co-partnership or individual.

Section 11. *Monthly and Quarterly Payment of Tax*: Where the amount of the license fee or tax is based upon gross income, the taxpayer may pay his fee or tax in equal monthly installments during the life of his license, each such installment to be paid on or before the 10th day of the month. In all other cases the taxpayer may pay his fee or tax in equal installments during the life of his license, each such installment to be paid on or before the 1st day of March, the 1st day of June, the 1st day of September and the 1st day of December, respectively.

Section 12. *When Tax Based on Current Year—Commencement of Business During Tax Year*: Where a business, occupation or pursuit subject to tax upon gross income has not been carried on for the full calendar or fiscal year next preceding the tax year for which license is required, the license fee or tax shall be paid monthly in installments during the life of the license on or before the 10th day of the month, and shall be based upon the gross income for the month next preceding that in which payment is due. In such cases the taxpayer shall make monthly returns similar to the annual returns provided for herein on or before the 10th day of the month, under oath or affirmation covering the business of the previous month.

In all other cases where a person commences during any tax year to engage in any business, occupation, pursuit or privilege, he shall be entitled to a license for the remainder of such tax year for the required fee apportioned in the ratio of said remainder to a full tax year.

Section 13. *Monthly payments—License Prerequisite*: In any case where the taxpayer pays his license fee or tax monthly he shall nevertheless first procure his "Occupation License" in the manner herein required before commencing or continuing in business, and shall pay the minimum fee or tax therefor, which shall be credited against future installments.

Section 14. *Sale or Transfer of Business*: Upon the sale or transfer during any tax year of a business on account of which a fee or tax is hereby required, the purchaser or transferee shall, if the fee or tax

has not been paid in full for said year, be responsible for its payment for that portion of said year during which he carries on such business.

Section 15. *Taxpayer to Keep Books and Records —Returns Confidential*: It shall be the duty of each taxpayer taxed upon his gross income to keep and enter in a proper book or set of books or records an account which shall accurately reflect the amount of his gross income, which account shall always be open to the inspection of the City Comptroller, or his duly authorized agent, and from which said officer or his agent may verify the return made by the taxpayer.

The applications, statements or returns made to the City Comptroller, pursuant to this ordinance, shall not be made public, nor shall they be subject to the inspection of any person except the Mayor, the Corporation Counsel, the City Comptroller, or his authorized agent, and members of the City Council.

Section 16. *Comptroller to Investigate Returns*: If any taxpayer fails to apply for license or make his return, or if the City Comptroller is dissatisfied as to the correctness of the statements made in the application or return of any taxpayer, said officer, or his authorized agent, may enter the premises of such taxpayer at any reasonable time for the purpose of inspecting his books or records of account to ascertain the amount of the fee or tax or to determine the correctness of such statements, as the case may be, and may examine any person under oath administered by said officer, or his agent, touching the matters inquired into, or said officer, or his authorized agent, may fix a time and place for an investigation of the

correctness of the return and may issue a subpoena to the taxpayer, or any other person, to attend upon such investigation and there testify, under oath administered by said officer, or his agent, in regard to the matters inquired into and may, by subpoena, require him, or any person, to bring with him such books, records and papers as may be necessary.

Section 17. *Over or Underpayment of Tax*: If the City Comptroller upon investigation or upon checking returns finds that the fee or tax paid on any of them is more than the amount required of the taxpayer, he shall refund the amount overpaid by a warrant upon the General Fund. If the City Comptroller finds that the fee or tax paid is less than required, he shall send a statement to the taxpayer showing the balance due, who shall within three (3) days pay the amount shown thereon.

Section 18. *Remedy for Non-payment of Tax*: If any taxpayer fails to apply for license, or make his return, or to pay the fee or tax therefor, or any part thereof, within three (3) days after the same shall have become due, the City Comptroller shall ascertain the amount of the fee or tax or installment thereof due and shall notify such taxpayer thereof, who shall be liable therefor in any suit or action by the City for the collection thereof. The City Comptroller shall also notify the Corporation Counsel in writing of the name of such delinquent taxpayer and the amount due from him and said officer shall, with the assistance of the City Comptroller, collect the same by any appropriate means or by suit or action in the name of the City.

Section 19. *Appeals to City Council*: Any taxpayer aggrieved by the amount of the fee or tax found by the City Comptroller to be required under the provisions of this ordinance, may appeal to the City Council from such finding by filing a written notice of appeal with the City Clerk within five (5) days from the time such taxpayer was given notice of such amount. The Clerk shall, as soon as practicable, fix a time and place for the hearing of such appeal, which time shall be not more than ten (10) days after the filing of the notice of appeal, and he shall cause a notice of the time and place thereof to be delivered or mailed to the appellant. At such hearing, the taxpayer shall be entitled to be heard and to introduce evidence in his own behalf. The City Council shall thereupon ascertain the correct amount of the fee or tax by resolution and the City Clerk shall immediately notify the appellant thereof, which amount, together with costs of the appeal, if appellant is unsuccessful therein, must be paid within three (3) days after such notice is given.

The President of the City Council, or the Chairman of any committee thereof before which the appeal is to be heard, may, by subpoena, require the attendance thereat of any person, and may also require him to produce any pertinent books and records. Any person served with such subpoena shall appear at the time and place therein stated and produce the books and records required, if any, and shall testify truthfully under oath administered by the Chairman in charge of the hearing on appeal as to any matter required

of him pertinent to the appeal, and it shall be unlawful for him to fail or refuse so to do.

Section 20. *Comptroller to Make Rules:* The City Comptroller shall have the power, and it shall be his duty, from time to time, to adopt, publish and enforce rules and regulations not inconsistent with this ordinance or with law for the purpose of carrying out the provisions thereof, and it shall be unlawful to violate or fail to comply with, any such rule or regulation.

Section 21. *Licenses—Posting—Unlawful Use Of:* All licenses issued pursuant to the provisions of this ordinance shall be kept posted by the licensee in a conspicuous place in his principal place of business in the City, except that all licenses for the operation of a vehicle shall be attached in a conspicuous place upon the right hand side of such vehicle in a suitable holder to be furnished by the City Comptroller upon the payment of a fee of Twenty-five ($.25) Cents.

No person to whom a license has been issued, pursuant to this ordinance, shall suffer or allow any other person chargeable with a separate license to operate under or display his license, nor shall such other person operate under or display such license.

Section 22. *False Returns, etc.:* It shall be unlawful for any person liable to tax hereunder to fail or refuse to make application or return for a license or to pay the fee or tax or installment thereof when due, or for any person to make any false or fraudulent application or return or any false statement or representation in, or in connection with, any such application or return, or to aid or abet another in any at-

tempt to evade payment of the fee or tax, or any part thereof, or for any person to fail to appear and/or testify in response to subpoena issued pursuant hereto, or to testify falsely upon any investigation of the correctness of a return, or upon the hearing of any appeal, or in any manner to hinder or delay the City or any of its officers in carrying out the provisions of this ordinance.

Section 23. *Effect of Partial Invalidity*: If any provision or section of this ordinance shall be held void or unconstitutional, all other parts, provisions and sections of this ordinance not expressly so held to be void or unconstitutional shall continue in full force and effect.

Section 24. *Penalty*: Any person violating or failing to comply with any of the provisions of this ordinance or any lawful rule or regulation adopted by the City Comptroller pursuant thereto, shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine in any sum not to exceed Three Hundred ($300.00) Dollars, or by imprisonment in the City Jail for a term not exceeding ninety (90) days, or by both such fine and imprisonment.

Section 25. This ordinance shall take effect and be in force thirty days from and after its passage and approval, if approved by the Mayor; otherwise it shall take effect at the time it shall become a law under the provisions of the city charter.

Passed the City Council the 23rd day of May, 1932,

and signed by me in open session in authentication of its passage this 23rd day of May, 1932.

JAMES SCAVATTO,
President Pro Tem of the City Council.

Approved by me this 25th day of May, 1932.

PHILIP TINDALL,
Acting Mayor.

Filed by me this 25th day of May, 1932.

Attest: H. W. CARROLL,
City Comptroller and Ex-Officio City Clerk.

(Seal) By E. M. STREET,
Deputy Clerk.

Published May 31, 1932.

H. W. CARROLL,
City Comptroller and Ex-Officio City Clerk.
By E. M. STREET,
Deputy Clerk.

No. 344

IN THE

Supreme Court of the United States

October Term—1933

PUGET SOUND POWER & LIGHT COMPANY, a corporation,

Appellant,

vs.

THE CITY OF SEATTLE, a municipal corporation,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

Petition for Rehearing

ELMER E. TODD,
FRANK E. HOLMAN,
WILLIAM M. ALLEN,
CLARENCE R. INNIS,
Counsel for Appellant.

1006 Hoge Building,
Seattle, Washington.

SUBJECT INDEX.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

Petition for Rehearing

Comes now the above named appellant, PUGET SOUND POWER & LIGHT COMPANY, and presents this, its petition for a rehearing of the above entitled cause, and in support thereof respectfully shows:

I.

ACCEPTING THE PRINCIPLE THAT THE "EQUAL PROTECTION CLAUSE DOES NOT FORBID DISCRIMINATION WITH RESPECT TO THINGS THAT ARE DIFFERENT," APPELLANT ASSERTS THAT IN THIS CASE THERE IS *IN FACT* NO DIFFERENCE BETWEEN APPELLANT AND THE CITY AS TO THE LIGHT AND POWER BUSINESS IN WHICH BOTH ARE ENGAGED.

There is no doubt about the fact that the city is engaged in the light and power business in a proprietary capacity. This has been definitely established by the Supreme Court of Washington. (Cases cited at page 35 of appellant's brief.) The difference between the governmental and proprietary functions of the city is also recognized and definitely established by this court. In *South Carolina vs. United States*, 199 U. S. 437, 462, this court quotes and approves the following definite statement of the law with respect thereto:

> "Such contracts are not made by the municipal corporation by virtue of its powers of local sovereignty, but in its capacity of a private corporation. The supply of gaslight is no more a duty of sovereignty than the supply of water. Both these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by those means. If this power is granted to a

borough or a city; it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the private property of the city, as much so as the lands and houses belonging to it. Blending the two powers in one grant does not destroy the clear and well-settled distinction, and the process of separation is not rendered impossible by the confusion. In separating them, regard must be had to the object of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc* is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred."

The ordinance exaction is not an income tax. It is not a property tax. It is a revenue license tax imposed by the city.

Both appellant and the city are engaged in the light and power business. Both sell electrical energy to the public for hire.

The Washington Supreme Court based its decision herein solely upon the premise that under the ordinance a tax is imposed upon the light and power business of appellant and is not imposed upon the light and power business of the city. That court, construing the ordinance, stated (*inter alia*):

"Conceding that the city's light and power revenues could be subjected to the tax, no machin-

ery is set up in the ordinance to accomplish such an end."

It was the province of that court to determine what the terms of the ordinance "authorized, commanded or forbade," and it is for this court to say whether "in view of its operation thus delimited it conflicts with the federal law."

Clement National Bank vs. Virginia, 231 U. S. 120, 134.

Regardless of how the state court reached its decision, its conclusion is stated in no uncertain terms:

"So the problem must be met as though Section 6 had been omitted from the ordinance; as though the city had levied the excise on the appellant and had exempted its own light and power business therefrom."

This definite decision of the Supreme Court of the state is not in any respect altered by a concession on part of counsel for the city that the ordinance imposes the tax upon the city's light and power business, or the assertion by counsel, of the city's willingness to pay the tax out of its gross revenues from that business. Unquestionably such concession and assertion are made in good faith by counsel. But counsel has no power to commit the city to the payment of the tax. The city can be committed only by ordinance lawfully enacted.

The decision of this court now is that there is a difference between the light and power business of

appellant and that of the city which warrants the imposition by the city of the ordinance tax upon appellant's business and the exemption of the city's similar business from the burdens thereof.

We do not controvert the principle that "the equal protection clause does not forbid discrimination with respect to things that are different." We do contend that if substance, not form, is controlling, there is no real difference between appellant and the city as to the light and power business in which both are engaged.

It would be conceded that a classification which would operate to impose the ordinance tax only upon men, or Democrats, or cooperative mutual organizations engaged in the light and power business, would be arbitrary and capricious. We contend that classification which the majority opinion in this case approves is equally arbitrary and capricious.

The use made of the net income, if any, of the business to be taxed has never been held to be the test of equality or inequality of a classification for license tax purposes. The capital stock of a private corporation engaged in such business may be owned wholly by Columbia University, or a church, or a hospital. The net income from the operation of the business may be used by the college, church, or hospital, or may be distributed as a dole to the unemployed. May such a fact be considered in determining whether a revenue

license tax imposed upon the business of selling light and power to the public for hire meets the requirement of equal protection of law, guaranteed by the Fourteenth Amendment? If the answer is in the affirmative, then the constitutional guaranty ceases to exist in fact. The tax imposed is not upon the proceeds of the business operation, or the use to which such proceeds may be dedicated. The tax is upon the business of selling light and power to the public for hire, in which business both appellant and the city are engaged. It seems wholly immaterial whether such proceeds, when earned, are converted into profits (if any) to stockholders, or into returns to customers by way of rebates or discounts, or into churches, schools, libraries or hospitals, or are converted into property to be used for the production and sale of more electrical energy.

The city is not performing any governmental function in selling electric light and power to its citizens. The public character of the service rendered by the city in supplying electrical energy to its customers is in no respect different from the character of the service rendered by appellant to its customers. The property of the city and the property of appellant used and useful in the business of selling electrical energy to the public for hire are both dedicated to the same public use.

The city is not engaged in the light and power business as a philanthropy. If, when and as the city

has power (which it does not now possess) and funds to enable it to give away electrical energy or to sell same at cost, it may or may not be necessary to consider the duties, if any, of the city to appellant under such facts. It may be that before that time arrives appellant's franchise will have expired. The present inquiry is as to the facts now operative. The city is now and for many years of necessity will be engaged in the business of selling light and power to the public for *profit*. Until all of the revenue bonds of the city have been paid out of earnings of its light and power business, the city must continue to operate same for profit. The revenue received by the city from said proprietary business is the sole source available for payment of said bonds.

At this point it seems in order to attempt to correct any misunderstanding that may exist as to the motive and purpose of appellant in alleging the issuance and existence of the city's revenue light and power bonds and the pledge by the city of the gross income of its light and power business to the payment thereof. In the minority opinion it is suggested that such facts were here presented because appellant "may have regarded the present suit as a suitable vehicle for getting its contention respecting such a pledge before a court," to the advantage of appellant in possible litigation as to the street railway bonds mentioned in the opinion. Appellant disclaims any such purpose.

The real purpose of appellant in alleging such facts, which are admitted by the demurrer, was to establish affirmatively that the city is in truth and in fact engaged in the business for profit. Until the principal of said revenue bonds is paid the city is obligated by the terms thereof and by the requirements of the underlying ordinances and statutes, to maintain rates which will be adequate to enable the city to operate and maintain its light and power business and to pay the principal and interest of said bonds. By reason of these facts it seems impossible to escape the conclusion that the city is in the business for profit—not for some philanthropic purpose. The result is the same in all respects as the result would be if the city invested its profits in some other enterprise or in real property rather than in the property and facilities used by it for the generation and sale of electric light and power.

With respect to the city's revenue light and power bonds, the argument was also presented that by reason of the covenants of the city therein, the city may not lawfully transfer any portion of the revenue received by it from its light and power business to the city's general fund; that therefore the attempt of the city to tax itself "so far as permitted by law" is an idle gesture.

This argument is consistent with the position that has been taken by the city itself. In a case now pending in the Supreme Court of Washington, being cause

Number 24943 in said court, entitled: "City of Tacoma, a municipal corporation, Respondent, vs. Tax Commission of the State of Washington, *et al.*, Appellants; City of Seattle, a municipal corporation, Intervenor, Respondent," the city is contesting the right of the State of Washington to impose a state occupation tax upon the city for the privilege of conducting its light and power business. (Ch. 191, Session Laws of 1933, State of Washington.) The legislative act imposes an occupation tax upon all persons engaged in the light and power business in the state, specifically including municipalities engaged in said business. The amount of the tax is measured by a percentage of the gross receipts of the taxpayers. In the trial court it was held that the state could not require the City of Seattle to pay the tax because of the pledge of the gross receipts of the city's light and power business to the payment of its light and power revenue bonds. The state appealed the case to the Supreme Court of the State of Washington. In that court the case has been argued and a decision may be available before this petition for rehearing is considered. Appellant is not a party to said action. In that case and in the brief of the city on file therein it is contended by the city that in application to it, the state occupation tax law is invalid because it operates to impair the contract obligation of the city to the holders of its light and power and street railway and water revenue bonds.

The following quotation is from page 7 of the city's brief in said case, at which page the city summarized the argument to be presented:

"ARGUMENT.

It is contended by the Cities that Chapter 191, particularly Section 2 (2) (c) [of the state occupation tax] is invalid as applied to them for two reasons: I. The Governor's purported veto of Section 2½ is void. II. The act in so far as it seeks to reach the revenues of the utilities, which revenues were theretofore lawfully pledged for the payment of revenue bonds and interest, impairs the obligations of the City's contracts with the holders of revenue bonds."

It is true that there is nothing in the present record to establish the foregoing facts. The reference, however, is to record facts on file in the Supreme Court of Washington. It is probable that a decision in the case above mentioned will be published within the next thirty days. When that decision is published the answer of the state court to the city's contention will be known.

The facts are that the only contention which the city may consistently make in this court is the contention made by it at pages 19-22 of its brief herein, which is that the city's inability to pay the tax is due to a want of power by reason of the operation of paramount law, namely, the contract clause in the Constitution of the United States. However, such a contention is unsound for the following reasons:

The "want of power" in the city to tax itself does not arise because of "any paramount law in favor of a portion of a class." There is and should be no "paramount" law which will enable the city to voluntarily place itself in a position to violate the Fourteenth Amendment to the Constitution of the United States. The city's presently asserted want of power (if any) to impose the tax upon its commercial enterprise is created by the city's desire for commercial as well as governmental supremacy in the field of the light and power business. The city was not required by any law to pledge the gross revenues of its light and power business to the payment of its bonded indebtedness, incurred in a commercial enterprise undertaken for profit and in a proprietary capacity. The city voluntarily made the contracts with the revenue bondholders because it was of advantage to the city to do so. There was no requirement of law that the city follow such procedure. It could have issued general lien bonds to finance its commercial light and power enterprise, had it been willing to submit same to the voters for approval, and successful in securing such approval. It seems wholly unsound to argue that by reason of the policy which the city voluntarily chose to follow for its own private advantage, it may thereby vest itself with power to contravene the Fourteenth Amendment to the Constitution of the United States and be thereafter free to deny equal protection of law to its com-

petitors in that commercial enterprise. The cases cited by the city (pages 19-22 appellee's brief) are irrelevant.

We earnestly urge this court to hold, consistent with the facts, that as to the light and power business in which both are engaged, the only difference between the city and appellant is one of ownership.

By reason of the foregoing considerations it is submitted that in application to appellant the ordinance operates to deny it equal protection of the law.

II.

THERE IS IN FACT NOTHING EXTRAORDINARY IN THE ARTICULATE PRINCIPLE CONTENDED FOR BY APPELLANT. APPELLANT'S CONTENTION IS THAT UNDER THE NOVEL FACTS OF THIS CASE THE IMPOSITION OF THE ORDINANCE TAX UPON APPELLANT IN TRUTH AND IN FACT CONSTITUTES AN APPROPRIATION OF ITS PROPERTY BY THE CITY FOR THE BENEFIT OF THE CITY'S LIGHT AND POWER BUSINESS, WITHOUT PAYMENT OF COMPENSATION.

We do not contend that the normal exaction of a tax lawfully imposed by the sovereign in any respect constitutes a taking of property without due process

of law. We do contend that under the novel facts of this case the imposition of the ordinance tax upon appellant in its *actual operation and effect* constitutes an appropriation of appellant's business by the city for the direct benefit of the city's proprietary light and power business.

We do contend that the vices of which appellant complains are not fears or apprehensions. They are realities which are inherent in any exercise by the city of any governmental power of excise taxation under the admitted facts.

At pages 63-71 of appellant's brief we endeavored to indicate the *practical* and *actual* results which follow the application of the ordinance to appellant. *Inter alia*, these will be the ultimate elimination of appellant from the light and power business in the city, the unlawful and oppressive invasion of the privacy of appellant's business by its competitor, and the unlawful appropriation of appellant's business and property by the city without compensation, all in direct aid and subsidy of the city's proprietary business.

The Washington Supreme Court recognizes the inherent unfairness of the tax, in the following language:

> "The possible consequences to appellant if it is subjected to an excise of three per cent upon

its gross revenues while its competitor escapes the burden are too obvious for discussion."

The risk of such discrimination was not one "assumed by appellant when it entered the field." Appellant did assume the risk of lawful municipal or private competition. It does not now shrink from meeting such legitimate competition.

Appellant did not assume the risk, however, of being required to contribute a portion of its competition-limited income to the general fund of its competitor, while its municipally owned competitor would escape from the burdens of such an exaction. Appellant did not assume the risk of being denied equal protection of the law.

Appellant did assume a risk that it would be required to meet the legitimate light and power rates and service of a competitor. The normal operation of the law of supply and demand, and the normal competitive features in the field of service and management were the only elements involved in any risks assumed by appellant.

Appellant did not assume a risk that its competitor, whether municipally owned or privately owned, could acquire power to confiscate its property.

The cause for appellant's complaint is not a so-called "congenital defect" in its property. It is the

attempt by the city to deplete appellant's state regulated and competition-limited gross income to the ultimate and direct benefit of the city's proprietary light and power business.

May it be suggested that there is nothing extraordinary in the implications of appellant's argument "when applied to expansions of government activities which have become commonplace"? The tax in question is not imposed by the state for the benefit of the state. It is not imposed by the United States. It is not an exaction which may be justified by reason of an emergency or as a social experiment. It is an exaction by the city, which is the taxpayer's competitor in a commercial enterprise, for ordinary revenue purposes. To deny the city the power to impose such a tax upon the business of its competitor, under the facts here presented, cannot possibly operate to curtail or impair any governmental functions of the city. In the light and power business, or any public utility business, by reason of its public nature and the fact that it is subject to regulation, the ultimate source of all excise tax exactions is the rate-payer. If the city may not perform its governmental functions without license tax revenue from the light and power business, (1) it may direct that the tax imposed be collected from all the rate-payers in the city and/or (2) it may legally impose the same burden which it imposes upon the light and power business of others, upon the light

and power business operated by the city, provided it actually pays said tax out of revenues received from its light and power customers. The granting of any greater power to the city inherently leads to the injustice, discrimination and unfairness which appellant is here resisting.

The articulate principle upon which appellant is relying to sustain its plea that any exercise of a power by the city to impose a revenue license tax upon its competitor constitutes a denial of due process of law under the facts of this case, is the prohibition against taking private property for private or public use without compensation. Sections 3 and 16, Article I, of the Constitution of the State of Washington prohibit such a taking. The due process clause of the Fourteenth Amendment is the similar prohibition in the federal Constitution.

The city may not directly appropriate appellant's property and business by condemnation without paying the fair value of same. The city should not be allowed to indirectly appropriate said property and business without resorting to condemnation and without paying the fair value thereof. Under the admitted facts, such an indirect appropriation inevitably follows the imposition of the ordinance tax upon appellant.

The following quotation from *Los Angeles Gas & Electric Co. vs. City of Los Angeles*, 241 Fed. 912,

921 (affirmed 251 U. S. 32), clearly states the articulate principle which should be here controlling:

> "As indicated hereinabove, assuming the necessity, propriety, and expendiency of such course to have been satisfactorily determined by those in authority, I am in entire harmony with a plan of municipal improvement such as has been projected in the city of Los Angeles and as is here under consideration. *I am, however, also firmly of the belief that until the city, by purchase, appeal to eminent domain, or otherwise, has lawfully and properly and justly eliminated competition, it must meet its competitors as any other private agency would be compelled to meet them, and must stand with them in the same relation to the law, and let its success be measured by its ability satisfactorily to serve the public, rather than by its power through the exertion of public functions to occupy a position of supremacy in the field which it deliberately has chosen to invade.*" (Italics supplied.)

Under the present decision of this court in the case at bar the asserted power of the city to annually appropriate three per cent of appellant's gross receipts (as asserted in the present ordinance) is confirmed. The city is also decreed the power to exempt its proprietary light and power business from the burdens of *any* contribution to the governmental expense of the city.

As grantee of the city, appellant is owner of a franchise which authorizes it to operate a light and power business in the city for a period of fifty years. In good faith appellant accepted said franchise, pio-

neered in developing that business and in rendering said public service, and invested large sums of its stockholders' money in property and facilities used exclusively for such purposes.

Under the facts here presented may the city now destroy the value of that property by appropriating appellant's gross receipts? May it be said that appellant should have anticipated that at some time before the expiration of appellant's franchise the city would be decreed power to confiscate appellant's property? May it be said that appellant should have anticipated that because the city might desire to impose a license tax upon the business of selling light and power to the public for hire, that only appellant's business would be subjected to such an exaction and that the similar business of appellant's competitors, if municipally owned, would be exempt from such a burden?

Under these facts may it be held that there is no relief for appellant in a court of law or in a court of equity? Facing the facts as they are, may it be said that the only relief available to appellant is legislative? May it be said that the city in fact has power by ordinance to compel appellant to cease doing business in the city? May it be said that while the city does not have power directly to legislate appellant out of business, it has power to accomplish the same end by the exercise of a governmental power of excise taxation?

Under these facts is the final holding of the courts to be that the city has power to tax appellant (its competitor) out of existence, by the exaction of a revenue license tax imposed only upon the light and power business of appellant?

If the answers to the foregoing questions are in the affirmative, then appellant and its stockholders became the innocent victims of a legal fraud when appellant accepted the franchise from the city, and thereafter in good faith invested their money in the light and power business in the City of Seattle.

Appellant earnestly submits that the judgment of the court in the case at bar operates to deny appellant and its stockholders that equality of treatment and that protection of their property which are the heritages of all citizens of the United States.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the Washington Supreme Court be, upon further consideration, reversed.

Respectfully submitted,

ELMER E. TODD,
FRANK E. HOLMAN,
WILLIAM M. ALLEN,
CLARENCE R. INNIS,
Counsel for Appellant.

1006 Hoge Building,
Seattle, Washington.

CERTIFICATE OF COUNSEL.

I, Clarence R. Innis, counsel for the above named appellant, Puget Sound Power & Light Company, for myself and associate counsel, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

CLARENCE R. INNIS,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES.

No. 344.—October Term, 1933.

Puget Sound Power & Light Company, Appellant, *vs.* The City of Seattle.	Appeal from the Supreme Court of the State of Washington.

[March 19, 1934.]

Mr. Justice Stone delivered the opinion of the Court.

This is an appeal under § 237 of the Judicial Code from a judgment of the Supreme Court of Washington, 172 Wash. 519, sustaining a municipal license or excise tax, assailed by appellant as infringing the Fourteenth Amendment and the contract clause of the Federal Constitution.

An ordinance of the City of Seattle of May 23, 1932, imposes an annual license tax upon the privilege of carrying on the business of selling or furnishing electric light and power to consumers. The tax is 3% of the gross income from the business "in the city" during the fiscal year next preceding the tax year for which the license is required. The suit, brought to recover an installment of the tax already paid and to enjoin the collection of future installments, was heard and decided upon demurrer to appellant's complaint.

Both appellant, a Massachusetts corporation, acting under a municipal franchise, and appellee, the City of Seattle, acting by state authority, are engaged and actively compete in the business of furnishing electric light and power to consumers for hire. By state law the city is given plenary power to fix rates for the electric current which it distributes, and its rates are not subject to regulation and control by the Public Service Commission, as are those of appellant. § 10390, Remington's Rev. Stat. of Washington. Revenues of the city from its electric light business are required by the city charter, Art. VIII, § 9, to be deposited in a special "city light fund", separate from the general funds of the city, and transfer from one fund to the other, except by direction of the city council, is forbidden by the city charter. Art. IX, § 17.

Section 6 of the ordinance, in terms, imposes the same tax on the city "so far as permitted by law", as that levied on appellant. But it appears that the city, acting under a state statute, § 9491, Remington's Rev. Stat. of Washington, enacted before the taxing ordinance, has issued bonds, the payment of which, both principal and interest, is secured by the revenue of its electric light business. Appellant contends that by the statute, municipal ordinance, and the terms of the bonds themselves, this pledge is superior to all other charges upon the gross revenue and that the city cannot lawfully pay the tax. It appears that in fact the city has not paid the tax or made any provision for paying it. The state court, in passing on this question, said:

"The city has not allocated, and probably cannot allocate, any of the revenues of its power and light business to the payment of such a tax. Bonds have been issued in excess of $30,000,000 against the revenues from that business; and those bonds are a prior lien on the entire income from it—taking precedence even over operating charges. Conceding that the city's light and power revenues could be subjected to the tax, no machinery is set up in the ordinance to accomplish such an end. Furthermore, in making up its budget for 1932, no provision was made for the levy of general taxes to cover the excise provided for in the ordinance. So the problem must be met as though § 6 had been omitted from the ordinance; . . . ".

Whether by this statement the Court intended to decide that the city could not lawfully pay the tax, or assumed that to be the case for the purpose of the decision, it is unnecessary to determine, for appellant further insists that even though the tax were paid by the city to itself it would impose no actual burden.

Asserting that no effective tax is imposed with respect to the business carried on by the city, appellant argues that the taxation of its competing business is a denial of equal protection and deprives it of its property without due process. The tax is also assailed because the measure of it is vague and uncertain and because, by imposing a license tax upon the privilege of doing the business, the ordinance impairs appellant's franchise contract which gave it the right to conduct the business.

In sustaining the constitutionality of the tax, the state court found it unnecessary to ascertain whether, under the city charter and ordinances, and state law, the tax if paid by the city must be paid from its city light fund rather than from its general

fund, or to what extent moneys may now or hereafter be transferred from one fund to the other, or how far the general fund raised by taxation may be used otherwise, either directly or indirectly, to aid the city's electric lighting business. We do not attempt to resolve these questions here. Decision that the city is not authorized by existing law to aid its light fund by taxation, without disposing of the constitutional question decided by the state court, would entail the decision of other questions, arising under the equal protection and contract clauses, not raised or considered in the case. Moreover the appellant insists that in any case payment of the tax would neither relieve appellant of its burden nor impose a comparable burden on the city, since the same hand would both pay and receive the tax, and there is no constitutional limitation on the power of the city to use the tax when collected for the maintenance of the city's business. *Standard Oil Co.* v. *City of Lincoln*, 114 Neb. 245; aff'd *per curiam* 275 U. S. 504. All the questions thus suggested are met and disposed of by decision of the constitutional question which the state court decided and which we decide here.

1. There is no contention that appellant's franchise or any contract relieves it generally from the duty of paying taxes. It is not contended that a state or municipality, merely because it fails or is unable to tax its own property or business, is prohibited from taxing like property or business. The contention here is that constitutional limitations are transgressed only because the tax affects a business with which the taxing sovereign is actively competing. For that reason it is argued that the taxation involves a forbidden discrimination and deprives appellant of its property without due process since the combined power of the city to tax and to compete may be used to destroy appellant's business. As appellant asserts that the tax can impose no effective burden on the city, its contention is, in effect, that the city, by virtue of the Fourteenth Amendment, upon entering the business forfeited its power to tax any competitor.

In conducting the business by state authority the city is exercising a part of the sovereign power of the state which the Constitution has not curtailed. The decisions of this Court leave no doubt that a state may, in the public interest, constitutionally engage in a business commonly carried on by private enterprise, levy a tax to support it, *Green* v. *Frazier*, 253 U. S. 233; *Jones* v. *City*

of Portland, 245 U. S. 217, and compete with private interests engaged in a like activity. *Standard Oil Co.* v. *City of Lincoln*, *supra*; *Madera Water Works* v. *Madera*, 228 U. S. 454; *Helena Water Works Co.* v. *Helena*, 195 U. S. 383.

We need not stop to inquire whether the equal protection clause was designed to protect the citizen from advantages retained by the sovereign, or to point out the extraordinary implications of appellant's argument when applied to expansions of government activities which have become commonplace. It is enough for present purposes that the equal protection clause does not forbid discrimination with respect to things that are different. The distinctions between the taxing sovereign and its taxpayers are many and obvious. The private corporation, whatever its public duties, carries on its business for private profit and is subject to the obligation, common to all, to contribute to the expense of government by paying taxes. The municipality, which is enabled to function only because it is a tax gatherer, may acquire property or conduct a business in the interest of the public welfare, and its gains if any must be used for public ends. Hence equal protection does not require a city to abstain from taxing the business of a corporation organized for profit merely because in the public interest the municipality has acquired like property or conducts a like business.

These differences are not lessened nor the constitutional exaction of uniformity increased because the city competes with a business which it taxes. Compare *Springfield Gas Co.* v. *Springfield*, 257 U. S. 66; *Hollis* v. *Kutz*, 255 U. S. 452; *Emergency Fleet Corp.* v. *Western Union*, 275 U. S. 415. The state may tax different types of taxpayers differently even though they compete. *State Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527; *Alaska Fish Salting & By-Products Co.* v. *Smith*, 255 U. S. 44; *Hammond Packing Co.* v. *Montana*, 233 U. S. 331; *Quong Wing* v. *Kirkendall*, 223 U. S. 59. It could not plausibly be argued that a private non-profit corporation distributing electric current to consumers at cost could not be exempted from taxes borne by others serving the same wants. Compare *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 40; *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389, 418; *Citizens Telephone Co.* v. *Fuller*, 229 U. S. 322. A business which in private hands might be exempted from taxation because not conducted for private profit is no less privileged because its capital is supplied by the government which controls it in the public

interest. These considerations are in no way affected by calling the city's activity "proprietary" instead of "governmental". Compare *South Carolina* v. *United States*, 199 U. S. 437, with *Murray* v. *Wilson Distilling Co.*, 213 U. S. 151 and *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514.

The injury, which appellant fears may result, is the consequence of competition by the city, and not necessarily of the imposition of the tax. Even without the tax the possibility of injury would remain, for the city is not bound to conduct the business at a profit. The argument that some way must be found to interpret the due process clause so as to preclude the danger of such an injury fails to point the way. Legislation may protect from the consequences of competition, but the Constitution does not. *Helena Water Works Co.* v. *Helena, supra; Vicksburg* v. *Henson*, 231 U. S. 259. The Fourteenth Amendment does not purport to protect property from every injurious or oppressive action by a state, *Memphis Gas Co.* v. *Shelby County*, 109 U. S. 398, 400; *St. Louis* v. *United Railways Co.*, 210 U. S. 266, 276, nor can it relieve property of congenital defects, *Madera Water Works* v. *Madera, supra*, 456. It does not preclude competition, however drastic, between private enterprises or prevent unequal taxation of competitors who are different. Those were risks which appellant took when it entered the field. No articulate principle is suggested calling for the conclusion that the appellant is not subject to the same risks because the competing business is carried on by the state in the exercise of a power which has been constitutionally reserved to it from the beginning.

Such was the decision in *Madera Water Works* v. *Madera, supra*, where this Court pointed out that in the absence of any contract restriction the Fourteenth Amendment does not prevent a city from conducting a public water works in competition with private business or preclude taxation of the private business to help its rival to succeed. See also *Springfield Gas Co.* v. *Springfield, supra*. Such must be our decision now.

2. The definition of gross income by § 2 of the ordinance, which is assailed as vague and indefinite, is that considered in No. 364, *Pacific Telephone & Telegraph Co.* v. *City of Seattle*. By §§ 10 and 20 the comptroller of the city is required to make rules and regulations, having the force of law, for carrying the or-

dinance into effect, and to provide blank forms of return upon which the taxpayer is to enter such information as the comptroller may require to enable him to compute the tax. As appellant alleges that it has received its license and paid the first installment of the tax, it appears that a practical construction has been given to the ordinance by an administrative officer competent to give it, which the state court has upheld. It is thus apparent that the ordinance, as construed, is sufficiently definite to enable the appellant to comply with it and as appellant's return for taxation and the method of computing the tax are not disclosed by the record no constitutional infirmity in the ordinance is revealed. See *Edelman* v. *Boeing Air Transport, Inc.*, 289 U. S. 249; No. 364, *Pacific Telephone & Telegraph Co.* v. *City of Seattle*, *supra*.

3. Appellant asserts a contract under its franchise to use the streets of the city for the purpose of carrying on its business for an unexpired term of years. It argues that the franchise is a contract license to carry on the business, and that the exaction of a tax as a condition precedent to the enjoyment of the license will operate to destroy the privilege granted by the franchise. This argument was made and answered in *Memphis Gas Co.* v. *Shelby County*, 109 U. S. 398, and in *St. Louis* v. *United Railways Co.*, 210 U. S. 266. Surrender of the state's power to tax the privilege is not to be implied from the grant of it. Hence, appellant took its franchise subject to the power of the state to tax the granted privilege in common with all other privileges and property in the state. Without a clearly expressed obligation on the part of the city to surrender that power the contract clause does not limit it. See *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365; *New Orleans City & Lake R. Co.* v. *New Orleans*, 143 U. S. 192; *Postal Telegraph Cable Co.* v. *Charleston*, 153 U. S. 692; cf. *Knoxville Water Co.* v. *Knoxville*, 200 U. S. 22.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 344.—October Term, 1933.

Puget Sound Power & Light Company, Appellant, *vs.* City of Seattle.	On Appeal from the Supreme Court of Washington.

[March 19, 1934.]

Mr. Justice Van Devanter specially concurring.

I concur in the judgment of affirmance, but not in the principal part of the court's opinion.

The appellant, the power company, assails the ordinance imposing the tax on the following grounds:

1. The ordinance contravenes the equal protection clause of the Fourteenth Amendment to the Constitution of the United States in that it lays the tax on the appellant's electric light and power business but not on the like and competing business of the city.

2. The ordinance offends the due process clause of that Amendment in that it prescribes severe penalties and liabilities for nonpayment of the tax and yet defines "gross income", on which the tax is to be computed, so vaguely that the amount of the tax can not be ascertained with reasonable certainty.

3. The ordinance impairs the franchise contract entitling the appellant to conduct its business within the city for a term of fifty years, and thereby infringes the contract clause of the Constitution, in that it makes the continued enjoyment of the franchise depend on the payment of the tax.

The assault is confined to this taxing ordinance. Other ordinances, some provisions in the city's charter, and still other enactments, have a real bearing on the matter, but their validity under the Constitution of the United States is not called in question.

I agree that the second and third grounds of the assault must be held untenable for the reasons stated in the opinion; and I further agree that the first ground must fail—but for reasons essentially different from those which the opinion announces.

The first ground proceeds on the theory that the city is free to accord equal treatment to the two competitive businesses, but by its ordinance unreasonably and arbitrarily discriminates against the business of the appellant and in favor of its own business by subjecting the former to the tax and omitting or refusing to subject the latter to a like burden. It therefore is of first importance to ascertain what the ordinance provides and what are the circumstances which surrounded its adoption and in which it is to be applied.

The ordinance was approved by the Mayor May 25, 1932, and was to become effective July 1 of that year. It provides in section 2 that the word "person" in the several sections shall be taken to include a corporation unless the context plainly shows otherwise; in subdivision (e) of section 5 that the tax shall be applied to "every person engaged in or carrying on" the business of selling or furnishing electric light and power within the city; and in section 6 that subdivision (e) of section 5 "shall, as far as permitted by law, be applicable to the City of Seattle, except that said City shall not, as a taxpayer, be required to conform to the other provisions of this ordinance"—the "other provisions" obviously being those which require sworn returns, application for license, etc.

The electric light and power business of the appellant and the like business of the city have been and are highly competitive, and are the only ones in the field. Both had their inception in ordinances adopted in 1902—the one under which the city entered the field being a little older than the one granting the franchise under which the plaintiff has proceeded. Both businesses have been greatly extended and enlarged in relative keeping with the growth of the city.

The city's business is conducted, as is required by statutory and charter provisions, as an independent unit distinct from all other activities of the city, whether governmental or proprietary; and the accounts, revenues, expenses and funds pertaining to the business are kept, handled and adjusted, as is similarly required, separately from other accounts, revenues, expenses and funds of the city. This independence and separation is not merely formal, but real and persistent. The city in its governmental capacity is a customer of its proprietary light and power business and obtains therefrom electric current needed for street lighting and other

municipal purposes. For this current the city in its governmental capacity pays each year a sum which is determined after a public hearing in which all who are interested are given an opportunity to participate. The payment is effected by transferring money from the city's tax-supported general fund, which is devoted to governmental uses, to the separate fund into which the revenues of the proprietary light and power business are required to be paid. The amount to be paid for such current in 1932 was given in the city's budget as $138,750.

The decisions of the Supreme Court of the State leave no doubt that the situation is as just stated. In *Uhler* v. *Olympia*, 87 Wash. 1, which relates to a proposed city-owned water system designed to supply for hire both private and municipal needs, that court says (p. 4): "The revenues to be received under the plan proposed . . . do not partake of the character of general funds, nor can the general fund be invaded if they are not sufficient"; and again (p. 14): "The city, in meeting functions that are called governmental, is taking [water] from the city . . . in its proprietary capacity; therefore the general fund of the city may be charged and the special fund credited with a reasonable charge for the water used [by the city] where it is so provided in the ordinance. The city, as a governmental entity, stands in the same relation to the system as a private citizen who is patronizing it." And that court further holds that, while it is admissible under the laws of the state for a city to make "temporary loans" from the tax-supported general fund to a special utility fund or vice versa, or from one special utility fund to another, if the borrowing fund is solvent and has an assured income from which repayment may be made, it is not admissible to make loans from one of these funds to another which is insolvent, or to make contributions or permanent diversions from one to another; and that attempted infractions of these restrictions may be prevented by injunction. *Asia* v. *Seattle*, 119 Wash. 674, 679-680; *Griffin* v. *Tacoma*, 49 Wash. 524, 529; *Uhler* v. *Olympia*, 87 Wash. 1, 7; *Von Herberg* v. *Seattle*, 157 Wash. 141, 147, 150-151.

Since 1916 the city has financed the extension and development of its electric light and power business by issuing and selling revenue bonds, without submitting the matter to the electorate or creating an indebtedness on the part of the city. The total of such bonds outstanding at the end of 1931 was approximately $32,000,-

000. By law and by their own terms these bonds are payable only from a bond fund specially created from revenues derived by the city from its electric light and power business.

The appellant in its complaint alleges that the gross revenues of the business are by law, underlying ordinances, and the terms of the bonds, pledged to the payment of the bonds, principal and interest; and that "such pledge constitutes a charge upon such gross revenues prior and superior to all other charges whatsoever, including charges for maintenance and operation". Counsel for the city, while not questioning the allegation in other respects, insist that under the applicable law the pledge is not of the gross revenues, but at most is only of what remains after paying costs of maintenance and operation, and that the tax in question if laid on the city's business pursuant to the ordinance may be paid from the gross revenues like other costs of maintenance and operation.

Section 9491 of Remington's Revised Statutes of Washington, under which appellant alleges the bonds were issued, makes provision for setting aside and paying into a special bond fund "any fixed proportion" or "any fixed amount" of the "gross revenues" from the business in aid of which bonds are issued, and for making the bonds payable "only out of such special fund". These provisions are followed by another in the same section declaring:

"In creating any such special fund or funds the common council or other corporate authorities of such city or town shall have due regard to the cost of operation and maintenance of the plant or system as constructed or added to, and to any proportion or part of the revenue previously pledged as a fund for the payment of bonds, warrants or other indebtedness, and shall not set aside into such special fund a greater amount or proportion of the revenue and proceeds than in their judgment will be available over and above such cost of maintenance and operation and the amount or proportion, if any, of the revenue so previously pledged."

The charter of the city also contains a provision, section 18 (Fifteenth), enabling the city to establish, operate and maintain a plant or system for furnishing electric power and light for industrial, individual and municipal uses, "and to provide and secure payment therefor in whole or in part by net earnings therefrom".

Section 9491, under which the appellant alleges the revenue bonds were issued, is not confined to enabling cities to supply an electric light and power service, but is also directed to enabling

them through the issue of like bonds to supply a street railroad service or a water service. In 1919 the appellant, which then owned a street railroad system in Seattle as well as an electric light and power system, sold and transferred its street railroad system to the city and received in payment fifteen million dollars of revenue bonds with a supporting pledge like that which the appellant sets forth in its complaint in the present case.[1] Controversy soon arose as to whether that pledge includes the entire gross revenue of the street railroad system or only what remains after paying the cost of maintenance and operation; and much litigation ensued in which the appellant persistently sought to establish the broader construction of the pledge. The litigation resulted in decisions recognizing and sustaining the pledge in several respects,[2] but leaving undetermined the question whether it includes all of the gross revenue or only what is left after the cost of maintenance and operation is paid. The case of *Von Herberg* v. *Seattle*, 157 Wash. 141, decided in 1930, appears to have been the last of the series. The appellant was a party and set up its contention as in the other cases. In concluding the decision the court said: "We accordingly express no opinion upon the question of whether or not wages and operating expenses of the street railway must be paid before the application of any money in the street railway fund to the payment of the bonds evidencing the purchase price of the system".

In view of that acute and undetermined controversy and its obvious bearing on the pledge given in support of the revenue bonds pertaining to the city's electric light and power business, it is easy to perceive why the city in adopting the ordinance of 1932 and providing in section 6 that the tax should be applicable to the city's business, inserted the words "as far as permitted by law". Evidently the city understood that, if the entire gross revenue from the business was pledged, it might be for that reason unable to pay out any part of the revenue for another purpose. It

[1]Twichell *v.* Seattle, 106 Wash. 32; Old Colony Trust Co. *v.* Seattle, 271 U. S. 426.

[2]Puget Sound Power & Light Co. *v.* Seattle, 284 Fed. 659; Von Herberg *v.* Seattle, 27 F. (2d) 458; Puget Sound Power & Light Co. *v.* Von Herberg, 278 U. S. 644; Puget Sound Power & Light Co. *v.* Seattle, 29 F. (2d) 254;

[3]Twichell *v.* Seattle, 106 Wash. 32; Asia *v.* Seattle, 119 Wash. 674; Von Herberg *v.* Seattle, 157 Wash. 141.

also is easy to perceive that the appellant, by reason of its interest in the street railroad revenue bonds, may have regarded the present suit as a suitable vehicle for getting its contention respecting such a pledge before a court and possibly establishing indirectly what it had been unable to establish through its earlier and direct efforts. Certainly the appellant could not reasonably have expected to enhance its chances of success in the present suit by introducing such a contention respecting the pledge given in support of the electric light and power revenue bonds.

Of the circumstances in which the ordinance was adopted and of the provision in section 6 declaring the tax applicable to the city's business, the state court said in the present suit:

"The city, in its proprietary capacity, is in competition with appellant in the power and light business. The possible consequences to appellant, if it is subjected to an excise of three per cent on its gross revenues, while its competitor escapes the burden, are too obvious for discussion. Evidently having such consequences in mind, the city council, by virtue of § 6 of the ordinance, has undertaken to subject the city's power and light business to the tax imposed upon persons and corporations engaging in that business. This is merely a more or less friendly gesture. The city has not allocated, and probably cannot allocate, any of the revenues of its power and light business to the payment of such a tax. Bonds have been issued in excess of $30,000,000 against the revenues from that business; and those bonds are a prior lien on the entire income from it—taking precedence even over operating charges."

Counsel differ widely respecting so much of this excerpt as speaks of the existing pledge as an obstacle to applying the tax to the city's business. Counsel for the city say this statement rests only on an allegation in the appellant's complaint and was made in the absence of a full presentation of the matter and without intention to render a decision thereon; and they present arguments and citations giving color to their assertion. On the other hand, counsel for the appellant insist the statement is decisive and point to its letter as justifying them in so insisting. It is obvious that the statement, when separately considered, makes strongly for the latter view; but when it is read in connection with prior decisions, which it does not mention, and with charter and statutory provisions, which are not noticed, there arises a real doubt whether it was made as a decisive utterance or as a recital of what was alleged

and only assumed to be true.[4] This is a matter on which only the state court can speak with ultimate authority; and as its solution, as will appear later on, is not essential for present purposes, it properly may be put to one side. When this is done, the appellant's charge of unreasonable discrimination amounting to a denial of equal protection needs to be examined with three suggested views of the existing pledge in mind—one treating it as including only the net revenues from the city's business, as the city asserts; another treating it as including the entire gross revenues, but subject to payment therefrom of any tax lawfully imposed on the city's business; and still another treating it as including the entire gross revenues and preventing, by reason of the contract clause of the Constitution, payment therefrom of the tax named in the ordinance, as the appellant insists.

The ordinance, in section 6, provides that the tax "shall, as far as permitted by law, be applicable" to the city's proprietary business. Unless the pledge be in the way it is plain that there is no legal obstacle to carrying this provision into effect.[5] The state court does not suggest the presence of any other obstacle; and counsel for the appellant do not show that there is any. On the other hand, counsel for the city concede that the ordinance imposes the tax on the city's business and assert the city's willingness to pay the tax out of the gross revenues from that business.

True, the appellant alleges in its complaint that the city budget for 1932 did not allocate any of the revenues from the city's business for such payment. But this allegation is of no significance. As counsel for the city point out, the budget was adopted late in 1931, while the taxing ordinance was not adopted until May 25,

[4] Inaccurate statements of counsel sometimes lead to erroneous assumptions by courts. Langford *v.* Monteith, 102 U. S. 145, 147.

[5] Louisville *v.* Commonwealth, 62 Ky. 295; Commonwealth *v.* Makibben, 90 Ky. 384; Clark *v.* Louisville Water Works Co., 90 Ky. 515 (affirmed 143 U. S. 1); Newport *v.* Commonwealth, 106 Ky. 434; Covington *v.* Commonwealth, 107 Ky. 680 (affirmed 173 U. S. 231); Western Saving Fund Society *v.* Philadelphia, 31 Pa. St. 175, 183; Chadwick *v.* Maginnes, 94 Pa. St. 117; County of Erie *v.* Commissioners, 113 Pa. St. 368; Vilas *v.* Manila, 220 U. S. 345, 356. And see Atlantic & N. C. R. R. Co. *v.* Commissioners, 75 N. C. 474; South Carolina *v.* United States, 199 U. S. 437; Los Angeles *v.* Los Angeles Gas and Electric Corporation, 251 U. S. 32; Bank of United States *v.* Planters Bank of Georgia, 9 Wheat. 904, 907; Curran *v.* Arkansas, 15 How. 304, 309.

1932, and did not become effective until July 1 of that year. Appellant's complaint was filed shortly after the ordinance became effective and before the time fixed for making up and settling another budget.

In view of the terms of the ordinance, and of the city's attitude declared by its counsel, it is manifest that, if the pledge be only of the net revenues, the tax falls on the city's business just as on the other, and that the charge of unreasonable discrimination is without any basis.

If the pledge be of the gross revenues but subject to payment therefrom of any tax lawfully laid on the city's business, thereby leaving the city free to pay the tax imposed by the ordinance out of such revenues, it still is manifest that the ordinance treats both businesses alike, and therefore that there is no discrimination.

If the pledge be of the entire gross revenues and, by reason of the contract clause of the Constitution, prevents the application of part of the revenues to the payment of the tax, it is very plain that such discrimination as results is neither arbitrary on the part of the city nor within the condemnation of the equal protection clause. The contract clause and the equal protection clause are both parts of the Constitution; and of course action taken or omitted in obedience to the contract clause cannot be regarded as a violation of the equal protection clause. Nor does the latter clause require that a right or exemption which under the other clause must be accorded to a particular business be also accorded to a similar business not otherwise entitled to it.[6]

It follows that in none of the suggested views of the pledge can the appellant's charge of unreasonable discrimination be sustained. And, this being so, there is no need for now considering which of the suggested views of the pledge is right.

Mr. Justice McReynolds, Mr. Justice Sutherland and Mr. Justice Butler concur in this opinion.

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[6] Raley Brothers v. Richardson, 264 U. S. 157; Packer Corporation v. Utah, 285 U. S. 105, 109; Des Moines National Bank v. Fairweather, 263 U. S. 103, 116-117; Union Bank & Trust Company v. Phelps, 288 U. S. 181, 187.